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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ERNEST BRAZIL,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY, AND SECRETARY OF THE NAVY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether section 717(a) of the Civil Rights Act of 1964, which provides that "[a]ll personnel actions" affecting civilian employees of the military shall be free from discrimination on the basis of race, provides a right of action to a civilian employee of the military who is discriminated against on the basis of race in a security clearance decision.

Whether a right of action for damages arises directly under the United States Constitution when the Fifth Amendment Due Process Clause is violated because a civilian employee of the military is discriminated against on the basis of race in a security clearance decision.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ernest Brazil respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment entered in the above-captioned proceeding on September 15, 1995.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit is reported at 66 F.3d 193, and is reprinted in the appendix ("App.") at 1a. The Order and Judgment of the United States District Court for the Northern District of California are not reported, and are reprinted at App. 16a and 15a, respectively. Because the Order of the District Court references the reasons stated at oral argument for its ruling, a transcription of that argument is reprinted at App. 18a. The Decision of the Equal Employment Opportunity Commission is not reported and is reprinted at App. 37a. The Report of Investigation by the Navy's investigator is not reported and is reprinted at App. 56a.

JURISDICTION

The court of appeals entered its judgment on September 15, 1995. (App. 1a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 717(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, now codified as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, as 42 U.S.C. § 2000e-16(a), provides, in relevant part, that "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." The "military departments" referred to are the Departments of the Army, Navy and Air Force. 5 U.S.C. § 102.

PERTINENT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . . "

STATEMENT OF THE CASE

Mr. Ernest Brazil, a former civilian employee of the United States Department of the Navy, contends that the Navy unlawfully discriminated against him on the basis of race when it revoked his Personnel Reliability Program (PRP) certification, which is akin to a security clearance.[1]

[1] PRP Certification is an accreditation that allows an employee to work around nuclear material. The parties have

The Navy contends, and the Ninth Circuit held, that the federal courts lack jurisdiction to determine whether a security clearance revocation was based on discrimination in violation of Title VII of the Civil Rights Act of 1964. The court also held that Mr. Brazil could not bring suit directly under the Fifth Amendment.

A. The Allegations of Discrimination

Mr. Brazil, who is African-American, began working for the Department of the Navy's Military Sealift Command, Pacific in 1983 as a civilian employee. After five years of reliable service and good performance evaluations, the Navy certified Mr. Brazil in its nuclear weapon Personnel Reliability Program. He was assigned as a "wiper" – a janitor – to a transport ship that had the capability of transporting nuclear weapons.

Mr. Brazil asserts that he was the object of discriminatory treatment on the basis of race during his few months on the ship, and that the ship's Captain was motivated by racial discrimination when he transferred Mr. Brazil from the ship and recommended that Mr. Brazil's PRP certification be revoked permanently. (App. 56a-68a)

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agreed that a PRP certification is equivalent to a security clearance and the Court of Appeals treated it as such. (App. 4a n.1)

B. The Administrative Proceedings Below

After being thrown off the ship, Mr. Brazil filed an administrative complaint with the Navy alleging discrimination. The Navy's investigator concluded that Mr. Brazil established a prima facie case of discrimination on the basis of race. He then reviewed the reasons advanced by the Navy for its revocation of Mr. Brazil's security clearance, discredited each, and found they were a pretext for discrimination. (App. 61a-67a) The Navy refused to accept its own investigator's conclusions. Instead, it permanently decertified Mr. Brazil from the PRP program. Mr. Brazil appealed the Navy's decision to the EEOC, which affirmed the revocation. (App. 37a)

C. The Judicial Proceedings Below

On June 19, 1991, Mr. Brazil filed a civil action in the United States District Court for the Northern District of California. The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, and under 28 U.S.C. § 1331. The Navy moved for summary judgment, arguing in part that this Court's decision in *Department of Navy v. Egan*, 484 U.S. 518 (1988), prohibited judicial review of the merits of a security clearance decision. The district court agreed. It concluded that even in the face of "proof of illegal racial discrimination," a civilian employee of the United States Navy has no judicial remedy because of "[t]he Executive's compelling interest in national security." (App. 31a) This is true, the district court held,

regardless of whether the right asserted is of statutory or constitutional origin. (App. 31a, 32a)

The Ninth Circuit affirmed, holding that a court "lacks jurisdiction" to review a security clearance decision, even in the context of a Title VII discrimination action. (App. 4a) The court acknowledged that section 717(a) of Title VII provides that " '*[a]ll personnel actions* affecting civilian employees . . . in military departments . . . shall be made free from discrimination based on race, color, religion, sex, or national origin.' " (App. 10a) (quoting 42 U.S.C. § 2000e-16 (emphasis in original)). However, it then disregarded this plain statutory language because Congress did not add the words "including security clearances." Therefore, according to the Ninth Circuit, this Court's decision in *Egan*, and the Ninth Circuit's decision in *Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991), "preclude judicial review of security clearance decisions made by the Executive or his delegee." (App. 6a)

The Ninth Circuit also held that civilian employees of the military cannot bring a *Bivens*-type[2] claim directly under the Fifth Amendment to seek redress for discrimination in a security clearance decision. (App. 11a-12a) According to the Ninth Circuit, because Congress provided some mechanism for reviewing all personnel decisions affecting civilian employees of the military *except* for security clearance decisions, civilian employees of the military cannot bring a *Bivens*-type claim under the Fifth

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[2] *Bivens v. Six Unnamed Known Fed. Narcotics Agents*, 403 U.S. 388, 397 (1971).

Amendment for discrimination in security clearance decisions. (App. 11a)

REASONS FOR GRANTING THE WRIT

I. The Lower Federal Courts Have Needlessly Set A Course That Deviates From The Important National Policy of Eradicating Workplace Discrimination And That Is Contrary To This Court's Precedents; Only This Court Can Redirect Them

Congress enacted Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972 as part of an ongoing effort to "assure equality of employment opportunities" by eliminating "those practices and devices" that discriminate on the basis of race, color, sex, religion, and national origin. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). Congress proclaimed that this policy of eradicating workplace discrimination should have the "highest priority." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

Congress implemented this national policy by enacting sweeping, protective statutory language. Specifically, Congress provided, in relevant part, that "[a]ll personnel actions" affecting civilian employees of the military "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). This language does not brook any exceptions to the protections against discrimination that Congress extended to civilian employees of the military. As this Court once stated, "Title VII's strictures are absolute

and represent a congressional command that each covered employee be free from discriminatory practices." *Alexander*, 415 U.S. at 51.

In spite of this unambiguous congressional mandate, for the third time in three years, the lower federal courts have abandoned this important national policy against workplace discrimination. The Ninth Circuit here, as well as the Fourth Circuit and the United States District Court for the Western District of Texas, have all concluded that even though Title VII protection extends to "[a]ll personnel actions" affecting civilian employees of the military, it does not confer a right of action or remedies on civilian employees of the military who contend that a personnel action regarding their security clearance was based on discrimination. (App. 10a); *Guillot v. Garrett*, 970 F.2d 1320 (4th Cir. 1992); *Perez v. Federal Bureau of Investigation*, No. EP-87-CA-10, slip. op. at 8 (W.D. Tex. Feb. 6, 1995).[3] The Ninth Circuit also held that a civilian employee of the military cannot bring suit directly under the Fifth Amendment's Due Process Clause for discrimination in a security clearance decision. (App. 11a-12a); *see also Hill v. Department of Air Force*, 844 F.2d 1407, 1413 (10th Cir.), *cert. denied*, 488 U.S. 825 (1988) (same).

Unless this Court intervenes, civilian employees of the military – who are nearly one million in number – have no remedy for discrimination in a security clearance

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[3] The same issue arose yet again in *Jamil v. Secretary, Dep't of Defense*, 910 F.2d 1203 (4th Cir. 1990), but the court resolved the case on other grounds.

decision.[4] As a result, the right of an individual to be free from discrimination will have become merely precatory. But the Ninth Circuit unnecessarily abandoned this nation's continuing endeavor to stamp out discrimination in the workplace, when no other statute, no constitutional provision, and no precedent of this Court requires such a result. In fact, the Ninth Circuit's reasoning conflicts with this Court's applicable precedents. Given the number of people involved, the frequency with which this type of case is arising, and the importance of the national interests at stake, this Court should – and only this Court can – review the course set by the lower federal courts.

In reaching its conclusion that civilian employees in petitioner's position have no remedy for discrimination under circumstances that would give rise to a remedy in any other context, the Ninth Circuit's decision conflicts with at least three of this Court's decisions. First, the Ninth Circuit's approach to statutory interpretation is contrary to this Court's teachings and sets a troublesome precedent. The Ninth Circuit has created an exception to the plain language of Title VII by interpreting "[a]ll personnel actions" affecting civilian employees of the military to mean "all personnel actions *except security clearance decisions.*" But "all" is a very simple and very plain word that admits of no exceptions. Because the Ninth Circuit apparently either does not believe that

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[4] The Department of Defense employs approximately 900,000 civilian employees. *Military Pay Raise Splits Administration*, S.F. CHRON., Aug. 8, 1994, at A5. The number of civilian employees who hold security clearances is classified information.

Congress meant what it said or believes that Congress acted unwisely when it authorized judicial determination of whether a security clearance decision was tainted by discrimination, it disregarded the plain language of the statute. According to the Ninth Circuit, Congress cannot use broad inclusive language with assurance it will be applied as written; rather, Congress must enact a laundry list of a statute's potential applications to be sure the courts will implement its statutory schemes.

The Ninth Circuit's reasoning conflicts with this Court's interpretation of similar language in *South Dakota v. Bourland*, ___ U.S. ___, 113 S. Ct. 2309 (1993). There, the Court was interpreting the scope of a statute governing the rights of the Cheyenne River Sioux Tribe and noted that for Congress to abrogate Indians' treaty rights, "Congress [must] clearly express its intent to do so." *Id.* at 2315-16. Applying this standard, the Court held that it is "self-evident" that "when Congress used the term 'all claims, rights, and demands' of the Tribe, [citation], it meant *all* claims, rights, and demands." *Id.* at 2317 n.10 (emphasis in original). Without review, this Ninth Circuit opinion signals courts in that circuit that they may disregard plain statutory language any time the parties persuade them that an important national interest is implicated. That approach has far-ranging implications, not only in this context, but in others as well.

Second, the Ninth Circuit's failure to strike a balance between national security and the right to be free from discrimination violates the principle announced by this Court earlier this year in *McKennon v. Nashville Banner Publishing Co.*, ___ U.S. ___, 115 S. Ct. 879 (1995). There this Court held that factors extraneous to the occurrence

of discrimination do not abrogate an individual's right to bring suit and receive redress for discrimination, although those factors may limit the remedies available. Thus *McKennon* held that an employee discharged in violation of the Age Discrimination in Employment Act is not barred from all relief when, after his or her discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful grounds. *Id.* at 884. In this case, the only threat that Title VII adjudication arguably poses to national security is if the courts were to override the Executive's security clearance decision and confer the clearance, *infra* 19-20. Consistent with *McKennon*, the Ninth Circuit should have, at the very least, held that a court can adjudicate Title VII claims involving a security clearance but cannot reinstate the security clearance.

Third, even assuming the Ninth Circuit was correct in concluding that Title VII does not apply in this context, its holding that Title VII forecloses a right of action under the Fifth Amendment to those in petitioner's position conflicts with *Davis v. Passman*, 442 U.S. 228 (1979). *Davis* involved a discrimination claim by a congressional staffer who alleged discrimination on the basis of sex and who, like petitioner in this context if the Ninth Circuit is correct, was unprotected by Title VII. This Court reviewed Title VII and found that there was "no *explicit* congressional declaration that persons" unprotected by Title VII may not bring a *Bivens*-type claim under the Fifth Amendment. *Id.* at 246-47 (quoting *Bivens*, 403 U.S. at 397) (emphasis in *Davis*). Rather, Congress was silent on the issue, and such silence is a far cry from clearly discernible congressional intent. *Id.* at 247. Accordingly, the Court

held that section 717 of Title VII does not foreclose a direct action under the Fifth Amendment by "those expressly unprotected by the statute." *Id.* Congress has done nothing in intervening years to undermine *Davis'* interpretation of Title VII. Assuming Title VII leaves civilian employees unprotected from discrimination in a security clearance decision, *Davis* teaches that they may proceed directly under the Fifth Amendment.[5] Yet, the Ninth Circuit closed the courthouse doors to civilian employees in petitioner's position because "[i]t cannot be said that [Congress'] failure to provide complete relief was 'inadvertent,' " when the *most* that could be said is that Congress was silent on the issue. (App. 11a)

Finally, the Ninth Circuit opinion conflicts with this Court's decision in *Egan*. The Ninth Circuit stated that even though petitioner's "circumstances may be compelling, he asks the court to do exactly what *Egan* . . . forbid[s]." (App. 8a) But the Ninth Circuit is wrong, *infra* 15-20. *Egan* does not support the Ninth Circuit's conclusion that the military is above the anti-discrimination law when it employs civilians. Nor does *Egan* compel the

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[5] Similarly, the Ninth Circuit's rationale also conflicts with the holding in *Webster v. Doe*, 486 U.S. 592 (1988). In *Webster*, this Court held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster*, 486 U.S. at 603. Rather than determining whether Title VII satisfied this "heightened showing" [*id.*], the Ninth Circuit reasoned that Congress' failure to provide complete relief to civilian employees of the military from discrimination in the security clearance context cannot be said to be "inadvertent." (App. 11a)

courts to graft onto Title VII a judicially created exception that is contrary to its plain terms. Finally, *Egan* does not direct the courts to protect the Executive's undisputed interest in national security without even attempting to strike a balance that also preserves the right of employees to be free from discrimination. Thus, this Court should grant review because only this Court can clarify *Egan's* reach.

This Court should also grant review because this case raises a question of national significance – the appropriate balance between two competing and important policies: national security and an individual's right to be free from racial discrimination. There is no plausible statutory basis for the decisions of the Ninth and Fourth Circuits that security clearance decisions are immune from discrimination scrutiny. Rather, these courts are making a policy determination, which they justify on the basis of *Egan*. Assuming arguendo that the plain language of Title VII can be disregarded and courts can make an independent policy determination, the Ninth Circuit drew its line in the wrong location. It struck no balance at all. The Ninth Circuit offered no protection to the right to be free from racial discrimination, even though both national security and the right to be free from discrimination can be accommodated without violence to either, *infra* 17-20. This issue is too important to be left to the lower courts. Thus, this Court should decide whether the Ninth Circuit went too far by giving absolute protection to a claim of national security, at the unnecessary expense of the national policy against workplace discrimination and the individual right to be free from discrimination.

Given the sheer numbers of people involved, the Ninth Circuit's decision has ramifications for the nation's anti-discrimination policy that extend far beyond this case. It affects all civilian employees of the military who might be victims of an adverse security clearance decision that was motivated by discrimination on the basis of race, color, religion, sex, or national origin. It also affects any person, whether employed by the United States or a private employer, who holds or might need to hold a security clearance as a condition of employment. Extended to its logical conclusion, the Ninth Circuit's opinion could also immunize from scrutiny for discrimination any personnel action the military even *asserts* is related to national security.

Finally, this Court should grant review because the Ninth Circuit's failure to give weight to the national policy against discrimination sends the wrong signal to the military, its civilian employees, and employers. By saying that any national security concern – no matter how tenuous – abrogates the right to be free from racial discrimination, the Ninth Circuit holds that military officers can engage in racial discrimination against civilian employees with impunity if it is for a "good" purpose. And this immunity comes not from Congress, but is a doctrine created by the federal courts. Especially in this time of heightened racial tensions, it ill-behooves the courts to create an exception that immunizes discrimination where Congress did not.

II. The Ninth Circuit's Conclusion That Title VII Does Not Apply To Personnel Actions Involving A Civilian Employee's Security Clearance Disregards The Plain Language Of The Statute And Is Unnecessary To Protect National Security

A. Title VII Provides A Right Of Action To Civilian Employees Of The Military To Remedy Illegal Racial Discrimination In Security Clearance Decisions

Section 717(a) of Title VII, codified as amended at 42 U.S.C. § 2000e-16(a), extends the protections afforded by the Civil Rights Act of 1964 to federal employees, including civilian employees of the military: "All personnel actions affecting employees or applicants for employment . . . in military departments as defined in § 102 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." The "military departments" referred to are the Departments of the Army, Navy and Air Force, 5 U.S.C. § 102. Thus, Title VII protects the civilian employees of the Navy, Air Force, and Army. *Gonzalez v. Department of Army*, 718 F.2d 926, 927-28 (9th Cir. 1983).

Section 717(a)'s language is plain, unambiguous and dispositive unless its application would lead to an absurd result or frustrate Congress' clear intention. *Hubbard v. United States*, ___ U.S. ___, 115 S. Ct. 1754, 1759 (1995). To conclude otherwise would violate the canon of statutory construction that a court is without power to create an exception in the plain language of the statute where Congress has not. *Hallstrom v. Tillamook County*, 493 U.S. 20, 26 (1989). Even the Navy conceded below that this plain language "argument would ordinarily have merit"

in any other context. (Supp. Appellee's Brief 13) Moreover, the occasion of this case is not some unforeseen context for the application of Title VII. Surely, Congress would have anticipated that application of Title VII to civilian employees *of the military* would involve security clearances and still Congress did not place limits on Title VII's broad, inclusive language.

Yet, in the face of the Navy's concession and cardinal rules of statutory construction, and without citing a shred of support in the language of Title VII, any other statute, or the United States Constitution, the Ninth Circuit held that Congress did not mean what it said. (*See* App. 6a-10a) The Ninth Circuit grounded its decision on *Egan*, but *Egan* does not compel this result.

Egan was not a Title VII case. Rather, in *Egan*, a civilian employee of the Navy at a submarine service facility was denied a security clearance due to his failure to disclose his criminal record and past problems with alcohol use. *Id.* at 521. Without a security clearance, Egan was not eligible for employment at the facility and he was removed from his job. Egan appealed the removal and the underlying security clearance decision to the Merit Systems Protection Board (Board) pursuant to 5 U.S.C. § 7513(d). That statute provides that the Board has authority to review "adverse actions," a term defined as "removal, a suspension for more than 14 days, a reduction in grade or pay, and a furlough of 30 days or less." *Egan*, 484 U.S. at 530 (citing §§ 7513(d), 7512). In this context, this Court addressed the "narrow question" of "whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in

the course of reviewing an adverse [personnel] action." 484 U.S. at 520. The Court concluded the Board did not have such statutory authority. *Id.* at 525-27.

The Court began its analysis by discussing whether a presumption of appellate review applied. The Court of Appeals had concluded that in the absence of a statutory provision prohibiting review, the presumption is in favor of review. *Id.* at 526. This Court concluded that such a presumption does not apply in a case involving national security concerns. *Id.* at 527. The Court explained that the predictive judgment inherent in a security clearance decision is an inexact science. Therefore, the Court concluded that it is reasonable to conclude that the agency head " 'should have the final say' " in a security clearance decision. *Id.* at 529 (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)). Thus, *Egan* announced a rule that *"unless Congress has specifically provided otherwise,"* courts should not intrude on security clearance decisions. *Id.* at 539 (emphasis added).

Egan then turned to the statutory provisions at issue and applied basic rules of statutory construction. *See Id.* at 530-32. The statutes in *Egan*, 5 U.S.C. §§ 7512 and 7513, do not provide broad authority to the Board to review security clearance decisions. To the contrary, they give the Board jurisdiction to specifically review only the enumerated personnel actions: removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. Because a denial of a security clearance is not on the list of personnel actions within the Board's authority, the Court concluded that the scheme "by its terms does not confer broad authority on the

Board to review a security-clearance determination." *Id.* at 530.

Title VII, however, does not restrict the scope of the reviewing entity's power by specifically listing reviewable personnel actions. On the contrary, Title VII contains the broadest grant of authority possible. Title VII provides a right of action to civilian employees of the military to vindicate discrimination in *all* personnel actions. Thus, the Ninth Circuit was wrong in relying on *Egan* to conclude that Title VII "does not 'by its terms . . . confer broad authority' on the federal courts to review security clearance decisions." (App. 10a). Rather, *Egan* presents no impediment to a judicial forum for a civilian employee of the military to air a Title VII claim. To say that it does threatens mischief, not only in this context, but in others as well, when the issue is the sweep of Congress' command.

B. The Ninth Circuit Needlessly Sacrificed The Right To Be Free From Unlawful Discrimination In The Workplace When It Could Have Merely Tailored Title VII's Remedies To Protect National Security

Even if *Egan* compels the proposition that courts should not be in the business of overriding security clearance decisions, *Egan* does not justify the Ninth Circuit's per se bar on discrimination actions. Instead, by restricting Title VII's remedies, the Ninth Circuit could have construed that statute in a way that preserves national security interests while still prohibiting discrimination in security clearance decisions.

One of Title VII's central objectives is to make whole, so far as possible under the facts and circumstances of a particular case, those persons who have suffered injuries caused by unlawful discrimination. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976). To that end, Title VII vests "broad equitable discretion in the federal courts to 'order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief the court deems appropriate.' " *Franks*, 424 U.S. at 763 (quoting 42 U.S.C. § 2000e- 5(g)). Thus, Title VII provides "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination . . . . " *Id.*

In these particular circumstances, the federal courts can hear the Title VII claim and award back pay or other relief, even if *Egan* forbids them from granting or reinstating the security clearance. The federal courts could also order the agency head to reconsider his or her security clearance determination without the discriminatory ground or grounds, yet stop short of ordering reinstatement.

This accommodation of interests is similar to the balance this Court struck in *McKennon*, which teaches that the Ninth Circuit should have held that Title VII creates a right of action, even if case-specific circumstances irrelevant to whether discrimination occurred limit the employee's remedies. *McKennon* involved the Age Discrimination in Employment Act, which is modeled after Title VII. The Court held that an employee who

is discharged in violation of the ADEA does not lose his or her right to bring suit to obtain redress when, after his or her discharge, the employer discovers evidence of wrongdoing that would have led to the employee's termination on lawful legitimate grounds. 115 S. Ct. at 884. Thus, here, the fact that a security clearance is implicated by the adverse personnel actions need not take away petitioner's Title VII right of action; at most it requires that his remedies be limited.

Title VII protection to civilian employees of the military in all personnel actions can occur without compromising legitimate national interests because only one potential Title VII remedy – judicial reinstatement of the security clearance – offers a legitimate threat to national security interests. First, the judicial proceeding will not inherently harm national security. This Court has already concluded that Title VII review of discrimination claims will not in and of itself compromise national security. *Webster*, 486 U.S. at 604. The courts are more than capable of taking such measures as are necessary to insure that Title VII review can be harmonized with legitimate national security interests. *Id.* In addition, in a case like this, where the Navy gives the employee the reasons for the security clearance revocation, judicial review of the proffered reasons will not entail the disclosure of any secret information.[6]

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[6] In this particular case, it would be absurd to contend that judicial review would inherently harm national security because the EEOC here conducted an inquiry into the merits of the Navy's security clearance decision without any objection by the Navy or apparent detrimental effect on national security.

Nonetheless, the Navy may contend, as it did below, that if it must be prepared to convince a court of the validity of its security clearance decisions its officers will be so fearful that they may have to show non-discriminatory reasons for their actions that they will fail to make decisions consistent with national security. (Supp. Appellee's Brief at 17) The Navy has not shown, and we doubt, that its officers are that timid. Further, by enacting Title VII, Congress struck a balance that should protect an individual's right to be free from discrimination but without "undue infringement upon the employer's rights and prerogatives." *McKennon*, 115 S. Ct. at 889.

In sum, the Ninth Circuit adopted a per se rule that requires a court that is presented with evidence of discrimination to dismiss any Title VII lawsuit that implicates a security clearance decision and thereby immunized discrimination without any corresponding benefit to national security. Thus, the Ninth Circuit's absolute ban unnecessarily abrogates all of the protection Title VII provides to civilian employees of the military.

III. The Ninth Circuit Also Erred In Holding That A Civilian Employee Cannot Proceed Directly Under The Fifth Amendment When Title VII Provides No Remedy

In the alternative to his Title VII claim, Mr. Brazil asserted a *Bivens*-type constitutional challenge under the Equal Protection Component of the Fifth Amendment Due

Process Clause.[7] The Ninth Circuit held, however, that a *Bivens*-type claim will not lie here. (App. 11a-12a) Rather, it held that Title VII is the exclusive remedy available to civilian employees for discrimination, even though, according to the Ninth Circuit, Title VII does not offer civilian employees of the military either a right of action or a remedy for discrimination in security clearance decisions. This reasoning is as erroneous today as it was more than fifteen years ago when this Court rejected it in *Davis*.

As a general rule, Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." *Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976). Where, however, Title VII does not extend its protections to a federal employee and does not explicitly foreclose a direct action under the Constitution, the employee may bring an action for damages under the Equal Protection Component of the Fifth Amendment Due Process Clause. *Davis*, 442 U.S. at 243-44. Under

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[7] The Navy asserted below that this claim must fail because Mr. Brazil sued the Secretary of the Navy in his official, rather than his individual capacity. The Ninth Circuit apparently rejected this argument because it ruled on the merits of the claim. The court was correct in doing so. Mr. Brazil can seek leave to amend his complaint to sue the Secretary individually, because "an amendment which merely changes the capacity in which the defendant is sued relates back because the facts from which the claim arises are unchanged and the defendant has notice of those facts from the beginning." *De Malherbe v. International Union of Elevator Constructors*, 449 F. Supp. 1335, 1354 (N.D. Cal. 1978); *see also Janicki Logging Co. v. Mateer*, 42 F.3d 561, 567 (9th Cir. 1994) (discussing district court's authority to allow complaint to be amended to change the capacity in which party has been sued, after statute of limitations has run); Fed. R. Civ. Proc. 15(c).

these rules, if Title VII does not extend its protections to civilian employees of the military who have been discriminated against in a security clearance decision, the employees should be able to seek relief directly under the Fifth Amendment.

Nonetheless, after interpreting the same statute, the Ninth Circuit reached the opposite conclusion and ruled that Title VII forecloses a Fifth Amendment action to a federal employee who is unprotected by Title VII. The Ninth Circuit reached this conclusion by expanding the reach of this Court's decision in *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988). Under *Schweiker*, a court should not imply a *Bivens*-type Fifth Amendment claim " 'where Congress has designed a program that provides what it considers adequate remedial mechanisms for constitutional violations.' " (App. 11a) (quoting *Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989)). Thus, "[s]o long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment, because 'Congress is the body charged with making the inevitable compromises required in the design of a massive and complex . . . program.' " (App. 11a) (quoting *Schweiker*, 487 U.S. at 429).

In *Schweiker* and *Kotarski*, however, plaintiffs were afforded some relief from unconstitutional actions by the statute at issue, but were not given a remedy in damages for emotional distress. Thus, the only issue was whether plaintiffs should have an *"additional"* remedy under the Fifth Amendment. *Schweiker*, 478 U.S. at 423-25, 429 (emphasis added). The Ninth Circuit has now expanded this doctrine to a very different circumstance – where

plaintiff has *no remedy* whatsoever for a violation of his or her constitutional rights. Nothing in *Schweiker* justifies that expansion and *Davis* forbids it.

Even if the Ninth Circuit correctly expanded *Schweiker,* it was wrong in concluding that Congress' "failure" to extend Title VII protection to security clearance decisions cannot be said to be "inadvertent." (*See* App. 11a) If the Ninth Circuit correctly interpreted Title VII's reach, Congress only "failed" to extend Title VII protection to those in petitioner's position because its language "[a]ll personnel actions" does not meet the apparently heightened standard of statutory construction purportedly established by *Egan* sixteen years *after* Congress enacted this section of Title VII. But it pushes the limits of reason to turn this "failure" into evidence of an omission *by Congress* that cannot be said to be "inadvertent," and thereby foreclose the Fifth Amendment right of action that would otherwise be available.

The Ninth Circuit's conclusion also creates an anomaly. Under the Ninth Circuit's reasoning, those civilian employees who claim they were discriminated against in a security clearance on the basis of Title VII's prohibited grounds – race, color, religion, sex, or national origin – have no remedy. But those civilian employees who claim they were discriminated against on a ground Congress has chosen not to protect in Title VII – such as sexual orientation – have a constitutional mechanism for redress. *See Webster,* 486 U.S. at 601-05.

In sum, the Ninth Circuit's opinion conflicts with *Davis* because if Title VII affords neither a right of action nor any remedies for discrimination against a civilian

employee of the military who is the victim of discrimination in a security clearance decision, and there is no evidence Congress intended Title VII to foreclose alternative remedies, Title VII does not foreclose a direct action under the Fifth Amendment.

CONCLUSION

Resolution of these issues should not be deferred. *Egan* has percolated through the lower federal courts, which have now made clear that they believe it compels them to immunize the military's discrimination against its civilian employees when neither Congress nor legitimate national security needs requires that result. Now, more than ever, this Court should leave no question as to whether the courthouse doors are open to discrimination claims. The petition for writ of certiorari should be granted.

DATED: December 14, 1995.

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation
PETER W. DAVIS
Attorneys for Petitioner
Ernest Brazil

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERNEST BRAZIL,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE NAVY, and SECRETARY OF THE NAVY, et al.,

Defendants-Appellees.

_____/

No. 92-16615

D.C. No. CV-91-01881-CAL

OPINION

Appeal from the United States District Court for the Northern District of California Charles A. Legge, District Judge, Presiding

Argued and Submitted
July 14, 1995 – San Francisco, California

Filed September 15, 1995

Before: Joseph T. Sneed, William C. Canby, Jr. and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Canby

SUMMARY

Individual Rights/Employment Discrimination/Labor and Employment

The court of appeals affirmed a district court judgment. The court held that, in the context of a Title VII discrimination case, the district court lacked jurisdiction

to review the Executive's decision to revoke a security clearance.

Appellant Ernest Brazil, an African American, was a civilian employee of appellee the United States Navy's Military Sealift Command. Brazil was assigned to a ship and was required to hold a Nuclear Weapons Personnel Reliability Program (PRP) certification as a condition of employment. Brazil obtained PRP certification.

The ship's captain paid Brazil off the ship and recommended that the Navy revoke his PRP certification. The captain cited disciplinary and interpersonal problems in which he alleged Brazil had been involved.

Brazil filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that in recommending revocation of his PRP certification, the captain discriminated on the basis of race. While the complaint was pending, the Navy terminated Brazil's employment on grounds of insubordination and threats to civilian employees. The Navy issued a finding of no discrimination, and the EEOC affirmed.

Brazil sued in the district court, alleging that the Navy discriminated against him on the basis of his race in violation of Title VII of the Civil Rights Act of 1964 by revoking his PRP certification. Brazil used a form complaint and filed the action in *in pro per*. The district court granted summary judgment in favor of the Navy. Brazil appealed.

[1] A previous Supreme Court holding and a previous Ninth Circuit holding precluded judicial review of security clearance decisions made by the Executive or his

delegee. The bar applies equally in the context of a Title VII discrimination action.

[2] In this case, a Title VII analysis necessarily would require the court to perform some review or the merits of the security clearance decision. [3] The district court correctly concluded that it could not determine whether the Navy's proffered reasons for its decision were legitimate without necessarily reviewing the merits of that decision. [4] Moreover, it was very likely to be impossible for a court to determine whether the given reasons were mere pretext without considering their merits.

[5] *Bivens*-type actions are not available where the claim involves employment discrimination and the plaintiff is a civilian employee of the military.

[6] A fair reading of the complaint did not include a claim for retaliatory discharge. [7] In light of Brazil's responses to questions on the form complaint, Brazil's complaint gave the Navy no inkling that he wished to bring his ultimate termination before the district court for review.

COUNSEL

Vickie L. Henry, Crosby, Heafey, Roach & May, Oakland, California, for the plaintiff-appellant.

E. Roy Hawkens, United States Department of Justice, Washington, D.C., for the defendant-appellee.

OPINION

CANBY, Circuit Judge:

In this case we must decide whether a federal court may, in the context of a Title VII discrimination case, review the Executive's decision to revoke a security clearance or the equivalent thereof. We conclude that the court lacks jurisdiction to conduct such a review, and we therefore affirm the district court's grant of summary judgment in favor of the Department of the Navy.

FACTS AND PROCEDURE

Mr. Ernest Brazil was a civilian employee of the United States Navy's Military Sealift Command, and was assigned to the ship USNS Kilauea on station in the Philippines. Because Kilauea is capable of carrying nuclear weapons, the Navy requires that each member of its crew hold a Nuclear Weapons Personnel Reliability Program (PRP) certification[1] as a condition of employment. Brazil had obtained PRP certification by December of 1988, when he was assigned to Kilauea.

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[1] A PRP certification is an accreditation to work around sensitive nuclear material, and is a prerequisite to employment in certain capacities or on certain Navy ships. Certification is awarded only after rigorous screening and background checks and is intended to be a predictor of the holder's reliability in dealing with the nuclear material. Although PRP certification is not the same as a security clearance, the Navy is anxious to treat it as such, and Brazil acquiesces. Thus, we will treat PRP certification and security clearance decisions as equivalent for purposes of this opinion.

On May 18, 1989, Kilauea captain Bruce Butterfield paid Brazil off the ship and recommended that the Navy revoke his PRP certification. Butterfield cited as justification several disciplinary and interpersonal problems which he alleged Brazil had been involved in during his six months on board, including run-ins with Philippine and military police, verbal and physical altercations with other mariners, an unfavorable performance review and displays of disrespect toward superiors.

In response, Brazil filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that in recommending revocation of his PRP certification, Butterfield discriminated on the basis of race (Brazil is black). Although the initial investigator assigned to Brazil's case recommended a finding of discrimination, the Navy ultimately issued a final finding of no discrimination. The EEOC affirmed this finding on administrative appeal.

In July, 1990, while Brazil's EEOC complaint was pending, the Navy terminated his employment on grounds of insubordination and threats to civilian employees. The insubordination charge arose as a result of Brazil's apparent refusal to accept assignment to another ship until his complaint had been resolved.[2] The Navy also claimed that Brazil had threatened to harm other employees while he was stationed in California awaiting resolution of his EEOC claim and reassignment.

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[2] PRP Certification is not required for many civilian postings on other Military Sealift Command ships and installations.

Brazil then filed this action in district court, alleging that the Navy discriminated against him on the basis of his race in violation of Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e-5, by revoking his PRP certification. Brazil here urges that his pleadings *in pro per* also embodied a claim for his ultimate termination from employment. The Navy moved for summary judgment, arguing that a Title VII analysis would necessarily require the court to review the merits of its decision to revoke Brazil's security clearance, and that such a review was precluded by law. The district court agreed and granted summary judgment in favor of the Navy. It did not address the issue of Brazil's later termination from employment.

ANALYSIS

I. The Reviewability of Security Clearance Decisions in a Title VII Action.[3]

[1] The Supreme Court's holding in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), and our own in *Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991), preclude judicial review of security clearance decisions made by the Executive or his delegee. That bar to review applies equally, we conclude, in the context of a Title VII discrimination action.

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[3] We review *de novo* grants of summary judgment. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

Although *Egan* prohibited only outside administrative board review of security clearance decisions, it provided the base from which *Dorfmont* extended its bar to judicial review. The court [sic] in *Egan* explained that, while there ordinarily might be a strong presumption favoring appellate review of administrative decisions, that presumption is negated when it conflicts with national security concerns. *Egan*, 484 U.S. at 527; *see also*, *Dorfmont*, 913 F.2d at 1401 (summarizing *Egan*).

At the core of *Egan*'s deference to the national security mission is the recognition that security clearance determinations are "sensitive and inherently discretionary" exercises, entrusted by law to the Executive. *Egan*, 484 U.S. at 527-29. The Court in *Egan* pointed out that security clearance decisions are highly uncertain, and heavily dependent on the ability of the decision-maker to predict the future behavior of the applicant. Thus the Court elected to leave the "[p]redictive judgment of this kind" to "those with the necessary expertise in protecting [the sensitive material]," rather than in the hands of "an outside nonexpert body." *Id.* at 529.

[2] In *Dorfmont*, we held that the Supreme Court's reasoning on the reviewability of security clearance decisions "applie[d] no less to the federal courts than to [administrative review boards]." *Dorfmont*, 913 F.2d at 1401. "When it comes to security matters, a federal court is 'an outside nonexpert body.' We have no more business reviewing the merits of a decision to grant or revoke a security clearance than does [a merit review board]." *Id.* Thus in *Dorfmont* we held broadly that judicial review, like outside administrative review, of security clearance decisions was precluded:

> The Department of Defense revoked [plaintiff]'s security clearance. The Department derives its authority directly from the President. The decision to grant or revoke a security clearance is committed to the discretion of the President by law. The district court therefore cannot review the merits of the department's decision to revoke [plaintiff]'s security clearance.

Id. (internal citations omitted). Although Brazil's circumstances may be compelling, he asks the court to do exactly what *Egan* and *Dorfmont* forbid, for we find that in this case a Title VII analysis necessarily requires the court to perform some review of the merits of the security clearance decision.

Analysis of a Title VII discrimination claim advances according to a three-step process. Under Title VII, a plaintiff has the initial burden of pleading a *prima facie* case of disparate treatment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the plaintiff is successful, the burden of production shifts to the defendant to provide legitimate, nondiscriminatory reasons for its actions. *Id.* at 802-04. Finally, should the defendant produce such legitimate, nondiscriminatory reasons, the burden is then on the plaintiff to establish by a preponderance of the evidence that the defendant's supposedly legitimate reasons were in fact a pretext to mask an illegal motive. *Id.*

[3] After finding that Brazil had made a *prima facie* case of discrimination satisfying step one of the Title VII analysis, the district court concluded that it could not perform step two to determine whether the Navy's proffered reasons for its decision were legitimate without

necessarily reviewing the merits of that decision. The court's conclusion was correct.

[4] The second and third steps of the Title VII analysis present an insurmountable hurdle for Brazil. It is impossible for the court to establish in the first place whether the Navy's proffered reasons were legitimate without evaluating their merits. Even if the court were able to get by step two, it is very likely to be impossible for it to proceed to step three and determine whether the given reasons were mere pretext without considering their merits. The district court thus properly applied *Dorfmont* in granting the Navy's motion for summary judgment.

Brazil argues that Title VII analysis does not involve a review of the merits because it does not require the court to determine whether the Navy's reasons for revoking his clearance were valid; it merely requires a determination of whether the proffered reasons were the actual reasons. We disagree. The more valid a reason appears upon evaluation, the less likely a court will be to find that reason pretextual; the converse is also true. Even when the court faces independent evidence of a discriminatory motive, it is still necessary to weigh the validity of the defendant's proffered reasons when deciding if they are pretextual. In short, the merit of such decisions simply cannot be wholly divorced from a determination of whether they are legitimate or pretextual. We therefore reject Brazil's argument.

Brazil finally asserts that *Dorfmont* and *Egan* do not control here because Congress has specifically provided for our review of Title VII claims arising from security

clearance decisions that are brought by civilian employees of the military. In support of his position, Brazil relies on section 717(a) of Title VII, which provides that *"[a]ll personnel actions* affecting employees . . . in military departments . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (emphasis added). According to Brazil, the use of the phrase "all personnel actions" demonstrates Congress' specific intent to include security clearance decisions within the scope of Title VII judicial review.

Like other courts before us, we are unconvinced by this argument. Neither the express language nor the legislative history of Title VII is as persuasive or definitive as Brazil urges. The provision does not "by its terms . . . confer broad authority" on the federal courts to review security clearance decisions. *Egan*, 484 U.S. at 530; *see also Guillot v. Garrett*, 970 F.2d 1320, 1325 (4th Cir. 1992) (holding that section 717 of Title VII does not "evidence the kind of unmistakable expression of purpose" necessary to conclude that Congress intended security clearance decisions to be subject to judicial review). We therefore reject this argument as well.

II. The *Bivens* Claim.

[5] In the alternative to his Title VII claim, Brazil asserts a direct constitutional challenge – a *Bivens* claim – to the Navy's action; he claims that the Navy's decision to revoke his clearance denied him equal protection as guaranteed by the Fifth Amendment. *Bivens*-type actions, however, are unavailable where the claim involves

employment discrimination and the plaintiff is a civilian employee of the military.

In *Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976), the Supreme Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." While the Supreme Court has created narrow exceptions to *Brown* for certain federal employees who would otherwise be without a remedy, *see Davis v. Passman*, 442 U.S. 228 (1979) (because Congress had explicitly exempted its staffers from coverage under Title VII, *Bivens*-type Equal Protection claim allowed), the rule is that "where Congress has designed a program that provides what it considers adequate remedial mechanisms for constitutional violations, *Bivens* action should not be implied." *Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989) (summarizing *Schweiker v. Chilicky*, 487 U.S. 412 (1988)). "So long as Congress' failure to provide more money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment, because 'Congress is the body charged with making the inevitable compromises required in the design of a massive and complex . . . program.'" *Id.*, 866 F.2d at 312 (quoting *Chilicky*).

We conclude that Brazil's circumstances parallel those of the plaintiffs in *Kotarski* and *Chilicky*. Brazil is covered by the "massive and complex program" of Title VII in all areas of discrimination *except* for that relatively narrow area dealing with security clearance decisions. Congress provided some mechanism for reviewing all personnel decisions negatively affecting Brazil save for those related to national security. It cannot be said that failure to provide complete relief was "inadvertent." The

district court correctly found that it could not hear Brazil's *Bivens* claim.

III. Appealability of Brazil's final termination.

[6] In addition to his claim involving the Navy's revocation of his PRP certification, Brazil argues that his action has always contained a companion claim for retaliatory discharge under Title VII, and that the district court erred by failing to address it in the ruling. We conclude that a fair reading of the complaint does not include a claim for retaliatory discharge.

Brazil filed and prosecuted his action *in pro per*. He used a form complaint where he simply filled in the blanks when information was requested. Such forms are, of course, fairly inflexible. They ask questions that are not tailored to a plaintiff's individual situation, and then they do not allow litigants the room to expand on answers when the questions don't quite fit.

For example, when faced with the following question on the complaint form:

. . . .

4. The acts complained of in this suit concern:

. . . .

A. ___ Failure to employ me.

B. ___ Termination of my employment.

C. ___ Failure to promote me.

. . . .

Brazil answered by checking selection B – "Termination of my employment." By this he could have meant revocation of his security clearance, as no other choice seems to better capture that possibility. He could also have meant that he was indeed complaining of his final termination. Finally, he could have intended to complain of both actions. If we were forced to judge from the rather ambiguous answer to question Four alone, we might liberally construe Brazil's pleading in favor of the *pro se* litigant, *United States v. Ten Thousand Dollars*, 860 F.2d 1511, 1513 (9th Cir. 1988), and find that he had intended to complain of his ultimate termination. However, we do not decide the question in a vacuum; the pleadings as a whole lead us to a different conclusion.

Question Seven on the form complaint asks, "The alleged discrimination occurred on or about," and then leaves a short space for the plaintiff to fill in. Brazil answered by entering the date "May 1989," the month that Butterfield paid him off the Kilauea and recommended that his PRP certification be revoked. That date is fully fourteen months before Brazil was terminated from employment.

Question Six on the form asks the plaintiff to state the basis facts surrounding his claim. Brazil's response deals entirely with the revocation of his PRP certification and his administrative battle to regain it. Nowhere in the response is his final termination mentioned. Finally, in his Response to Defendant's Answer, Brazil addressed only incidents surrounding his shipboard discipline and PRP revocation. Again, he did not mention his ultimate termination.

[7] Although a *pro se* litigant like Brazil may be entitled to great leeway when the court construes his pleadings, those pleadings nonetheless must meet some minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong. Brazil's complaint, fairly read, gave the Navy no inkling that he wished to bring his ultimate termination before the district court for review. We therefore find that the issue was not raised below; it is waived on appeal.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ERNEST C. BRAZIL,
Plaintiff,

v.

H. LAWRENCE GARRETT III, SECRETARY, UNITED STATES DEPARTMENT OF THE NAVY,

Defendant.

/

Case No.
C-91-1880-CAL

JUDGMENT

This Court having granted summary judgment in favor of Defendant, H. Lawrence Garrett III, Secretary, United States Department of the Navy, IT IS HEREBY ORDERED THAT judgment be hereby entered in favor of the United States and this action is dismissed with prejudice.

DATED: [8/10], 1992

/s/ Charles A. Legge
Charles A. Legge
United States District
Court Judge

ENTERED IN CIVIL DOCKET
[8/12], 19 [92]

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ERNEST C. BRAZIL,

Plaintiff,

v.

H. LAWRENCE GARRETT III, SECRETARY, UNITED STATES DEPARTMENT OF THE NAVY,

Defendant.

_____/

Case No. C-91-1880-CAL

ORDER GRANTING SUMMARY JUDGMENT

The motion of Defendant H. Lawrence Garrett III, Secretary, United States Department of the Navy, for summary judgment came on regularly for hearing before this Court on July 10, 1992. Susan L. Kamlet and Frederick R. Sciulli appeared as attorneys for defendant United States. Plaintiff Ernest C. Brazil appeared in *propria persona*.

After considering the moving and opposition papers, arguments of plaintiff and counsel and all other matters presented to the Court, the Court concludes, for the reasons stated on the record in open court, that there is no genuine issue of material fact and that Defendant is entitled to judgment as a matter of law.

Based on the foregoing IT IS HEREBY ORDERED THAT the motion is GRANTED.

DATED: [8/10], 1992

/s/Charles A. Legge
Charles A. Legge
United States District
Court Judge

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
CHARLES A. LEGGE, JUDGE

ERNEST C. BRAZIL, PLAINTIFF, VS. H. LAWRENCE GARRETT III, SECRETARY, UNITED STATES DEPARTMENT OF THE NAVY, DEFENDANT.	)	NO. C 91-1880 CAL

SAN FRANCISCO, CALIFORNIA
FRIDAY, JULY 10, 1992

APPEARANCES:

FOR PLAINTIFF: ERNEST BRAZIL, IN PROPRIA PERSONA
3436 HANNAH STREET
OAKLAND, CALIFORNIA 94608

FOR DEFENDANT: JOHN A MENDEZ, ESQ.
UNITED STATES ATTORNEY
450 GOLDEN GATE AVENUE
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BY: SUSAN L. KAMLET, ESQ.
ASSISTANT UNITED STATES ATTORNEY

MILITARY SEALIFT
COMMAND, PACIFIC
DEPARTMENT OF THE
NAVY
OAKLAND,
CALIFORNIA
94625-5010

BY: FREDERICK R. SCIULLI,
ESQ.
ASSISTANT
COUNSEL

REPORTED BY: CANDACE L. FRANCIS, CSR, CP, CM
OFFICIAL REPORTER, USDC

COMPUTERIZED TRANSCRIPTION
BY XSCRIBE

[p. 2] FRIDAY, JULY 10, 1992 10:12 A.M.

THE CLERK: CALLING CIVIL 91-1880, ERNEST BRAZIL V. SECRETARY OF THE NAVY, ET AL.

MS. KAMLET: GOOD MORNING AGAIN, YOUR HONOR. SUSAN KAMLET FOR THE UNITED STATES AND SECRETARY OF NAVY.

MR. SCIULLI: GOOD MORNING, YOUR HONOR. FREDERICK SCIULLI FOR THE NAVY.

MR. BRAZIL: GOOD MORNING, YOUR HONOR. ERNIE BRAZIL, THE PLAINTIFF.

THE COURT: ALL RIGHT. WE'RE HERE FOR THE CONTINUED HEARING ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

MR. BRAZIL HAS BEEN PROCEEDING IN PRO PER AND, AT OUR LAST HEARING, APRIL 17TH, I WAS

CONCERNED ABOUT CERTAIN LEGAL ISSUES WHICH I DID NOT BELIEVE HAD BEEN SUFFICIENTLY COVERED AND REQUESTED ADDITIONAL BRIEFING FROM DEFENDANTS. THAT BRIEFING HAS NOW BEEN RECEIVED AND I THINK WE'RE READY TO PROCEED.

SO I HAVE READ THE MOVING AND OPPOSING PAPERS, AND DOES EITHER MR. BRAZIL OR DEFENSE COUNSEL HAVE ANYTHING FURTHER YOU WISH TO ADD WITH RESPECT TO THE MOTION?

MR. BRAZIL: YES, I DO, YOUR HONOR.

THE COURT: PLEASE GO AHEAD, MR. BRAZIL.

MR. BRAZIL: IN MARCH THE 9TH, THE MOTION WAS FILED BY MISS KAMLET IN PROPRIA PERSONA. NOW, I WOULD LIKE TO KNOW WHO GIVE COUNSEL THE RIGHT TO WAIVE MY RIGHT TO COUNSEL.

[p. 3] THE COURT: NO, NOBODY HAS.

MR. BRAZIL: WELL, FOR ME TO APPEAR PRO SE –

THE COURT: YES.

MR. BRAZIL: – WHICH MEANS I WOULD HAVE TO APPEAR IN MY OWN BEHALF.

THE COURT: YEAH.

MR. BRAZIL: NOW, THERE IS NO RECORD – A MATTER OF RECORD SAYING THAT I WAS ON RECORD THAT I WOULD APPEAR PRO SE.

THE COURT: WELL, YOU MADE ALL YOUR FILINGS PRO SE.

MR. BRAZIL: NO, I DIDN'T MAKE FILINGS. I ASKED FOR COUNSEL.

THE COURT: WELL, NO. NO COUNSEL HAS BEEN AFFORDED – HAS BEEN AFFORDED TO YOU. YOU – YOUR FILES – EVERY FILING TO DATE HAS BEEN PRO SE. IT'S BEEN BY YOU WITHOUT AN ATTORNEY.

MR. BRAZIL: NO. YOUR HONOR, ON – ON NOVEMBER THE 12TH, I APPEARED BEFORE YOU WITH –

THE COURT: YEAH, RIGHT.

MR. BRAZIL: – STEPHEN SCHIRLE, WHO WAS SUPPOSED TO BE REPRESENTING ME IN THIS CASE.

THE COURT: MR. SCHIRLE?

MR. BRAZIL: SCHIRLE.

THE COURT: MR. SCHIRLE REPRESENTS THE UNITED STATES.

MR. BRAZIL: YES, BUT HE WAS HERE. YOU SENT ME TO HIS OFFICE – DOWN TO THE UNITED STATES ATTORNEY'S OFFICE TO FIND SOMEONE WHO WAS GOING TO REPRESENT ME IN THIS CASE. I WENT TO HIM. I WENT THERE. THEY SENT HIM HERE.

[p. 4] THE COURT: SENT WHO HERE?

MR. BRAZIL: STEPHEN SCHIRLE. WE APPEARED BEFORE YOU. HE WAS THE ONE THAT TOLD ME TO FILE THE SUMMONS. STEPHEN SCHIRLE.

THE COURT: MR. SCHIRLE CAN'T – COULDN'T REPRESENT YOU, MR. BRAZIL. HE'S A UNITED STATES ATTORNEY. HE REPRESENTS THE DEFENDANTS IN THE CASE.

MR. BRAZIL: BUT THAT WASN'T WHAT – THAT WASN'T THE WAY IT READ IN THE BEGINNING. THAT WAS NOT THE WAY IT READ IN THE BEGINNING.

YOU SENT ME TO THE UNITED STATES ATTORNEY'S OFFICE TO GET SOMEONE TO REPRESENT ME. STEPHEN SCHIRLE APPEARED HERE BEFORE YOU.

THE COURT: I THINK I SENT SOMEBODY TO THE UNITED STATES ATTORNEY BECAUSE, WHEN WE APPEARED AT THE STATUS CONFERENCE, NOBODY APPEARED FOR THE UNITED STATES, AND I ASKED YOU TO GO DOWNSTAIRS AND FIND A LAWYER AND COME UP HERE SO THAT WE COULD HAVE A SETTLEMENT – A STATUS CONFERENCE.

MR. BRAZIL: WELL, THAT'S NOT THE WAY I UNDERSTOOD IT.

THE COURT: OKAY. WELL –

MR. BRAZIL: THAT'S NOT THE WAY I UNDERSTOOD IT.

THE COURT: WELL, OF COURSE, WE'VE BEEN GOING ON FOR SOME NINE MONTHS.

MR. BRAZIL: THIS CASE HAS BEEN GOING ON FOR NINE MONTHS, AND THIS CASE HAS BEEN GOING ON FOR ALMOST FOUR YEARS.

THE COURT: YES, I KNOW.

[p. 5] ALL RIGHT. GO AHEAD, MR. BRAZIL.

(PAUSE IN PROCEEDINGS)

MR. BRAZIL: ON MARCH THE 9TH, THEY FILED A – A DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, YOU UNDERSTAND?

THE COURT: UH-HUH.

MR. BRAZIL: THIS IS THE BOOK FILED AND SIGNED BY SUSAN KAMLET.

THE COURT: UH-HUH.

MR. BRAZIL: ON JUNE THE 12TH, DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT WAS FILED JUNE THE 12TH. IN FOUR MONTHS, THEY ADDED THE WORD "SUPPLEMENTAL" BUT REPEATED THE SAME THING OVER AND OVER –

THE COURT: UH-HUH.

MR. BRAZIL: – SEE.

(PAUSE IN PROCEEDINGS)

MR. BRAZIL: THEY BASE THE CASE ON – AND THE ARGUMENT SAYS THAT MY CASE WAS BASED – "HE WAS SUBJECTED TO UNLAWFUL DISCRIMINATION WHEN THE NAVY REVOKED THE SECURITY CLEARANCE REQUIRED" –

THE COURT: WELL, YOU HAVE TO SLOW DOWN. SHE HAS TO TAKE DOWN WHAT YOU'RE SAYING, MR. BRAZIL, SO SLOW DOWN WHEN YOU'RE READING, PLEASE.

MR. BRAZIL: THE INTRODUCTION SAYS: "IN THIS EMPLOYMENT DISCRIMINATION ACTION, PLAINTIFF ERNEST BRAZIL [p. 6] CLAIMS THAT HE WAS SUBJECTED TO UNLAWFUL DISCRIMINATION WHEN THE NAVY REVOKED THE SECURITY CLEARANCE REQUIRED FOR HIS SERVICE UPON THE NUCLEAR-CAPABLE VESSEL USNS KILAUEA AND REPATRIATED HIM FROM THE SHIP."

THE COURT: SLOW DOWN, PLEASE. SHE CAN'T TAKE IT DOWN QUITE THAT FAST.

OKAY. GO AHEAD.

MR. BRAZIL: OKAY.

"ON BEHALF OF DEFENDANT, THE UNITED STATES ATTORNEY MOVED FOR SUMMARY JUDGMENT. AT ORAL ARGUMENT ON THIS MOTION, THIS COURT REQUESTED MORE INFORMATION – THE SOURCE OF THE . . . NAVY'S AUTHORITY TO MAKE SECURITY CLEARANCE DECISIONS – BEFORE IT COULD RULE ON THE MOTION."

THE COURT: YEAH.

MR. BRAZIL: "THE COURT ALSO INVITED THE NAVY TO CONDUCT MORE EXTENSIVE RESEARCH INTO THE . . . SEPARATION OF POWERS ISSUE RAISED BY ITS MOTION."

THE COURT: RIGHT.

MR. BRAZIL: YOUR HONOR, THERE IS NO EVIDENCE ON RECORD. YOU HAVE BEFORE YOU A COPY OF THE COMPLAINT IN THIS CASE –

THE COURT: YEAH.

MR. BRAZIL: – OF RACIAL DISCRIMINATION.

THE COURT: RIGHT.

[p. 7] MR. BRAZIL: THERE IS NO EVIDENCE – THERE IS NO – NO EVIDENCE PRESENT THAT I – I ASKED FOR DISCRIMINATION BECAUSE OF WHAT HAPPENED ABOARD THE KILAUEA FOR SECURITY REASONS.

THE COURT: YEAH, THAT'S RIGHT. THAT'S THEIR DEFENSE. THAT'S THEIR DEFENSE.

MR. BRAZIL: YEAH, THAT'S THEIR DEFERENCE.

THE COURT: RIGHT.

MR. BRAZIL: BUT THERE IS NO EVIDENCE OF THIS.

WHAT I'M SAYING TO YOU IS, IF THIS HAD BEEN A BREACH OF SECURITY ON THIS PARTICULAR SHIP, IT WOULD HAVE BEEN BEFORE THE FACT, NOT AFTER THE FACT.

THE COURT: WELL, THE PROBLEM, MR. BRAZIL, IS – IS NOT THAT I HAVE TO FIND THAT YOU BREACHED SECURITY. IT'S A QUESTION OF WHETHER THE NAVY'S DECISION THAT YOU BREACHED SECURITY CAN BE REVIEWED BY ME AT

ALL. THAT'S THE QUESTION, YOU SEE. THAT'S WHAT I ASKED THEM TO REBRIEF.

MR. BRAZIL: OKAY. BUT IT DOESN'T – DOESN'T IT MEAN THAT YOU HAVE TO HAVE EVIDENCE HERE?

NOW, WE KNOW WHAT – I KNOW THE SUMMARY JUDGMENT IS.

THE COURT: UH-HUH.

MR. BRAZIL: THE SUMMARY JUDGMENT IS BASED ON – TO STOP ME FROM APPEARING WITH ORAL EVIDENCE BEFORE YOU WITH WHAT THEY HAVE BEFORE YOU WITHOUT A LENGTHY TRIAL, WHICH MEANS THEY DO NOT WANT TO PRESENT THE EVIDENCE THAT I DO HAVE IN THIS CASE.

[p. 8] THE COURT: WELL, THEY CERTAINLY DON'T WANT TO GO TO TRIAL. THERE'S NO DOUBT ABOUT THAT.

MR. BRAZIL: YES. BUT I BELIEVE THAT IS MY RIGHT, TO GO TO TRIAL.

THE COURT: UH-HUH.

MR. BRAZIL: I BELIEVE THAT IS MY RIGHT –

THE COURT: OKAY.

MR. BRAZIL: – SEE?

THE COURT: ALL RIGHT.

MR. BRAZIL: THE SIXTH AMENDMENT SAYS THAT I'M ENTITLED TO A SPEEDY TRIAL BY – A SPEEDY TRIAL –

THE COURT: UH-HUH.

MR. BRAZIL: – SEE.

SEE, I HAVE KEY WITNESSES IN THIS CASE THAT WANT TO BE SUBPOENAED TO COURT, BUT IF – IF THEY ARE ALLOWED TO DO THIS, THEN I CANNOT.

AND THIS CLEARLY – IT'S CLEAR-CUT HERE THAT IT WAS RACIAL DISCRIMINATION. THIS HAD NOTHING TO DO WITH SECURITY, NOTHING AT ALL TO DO WITH SECURITY. IT WAS FOUND ON THE BASIS OF RACE BY THEIR OWN INVESTIGATOR.

(PAUSE IN PROCEEDINGS)

MR. BRAZIL: THEY COME UP WITH SECURITY REASONS. THEY COME UP WITH THIS ONLY AFTER I HAD BEEN HERE ALMOST THREE OR FOUR YEARS.

IF YOU LOOK AT THE RECORD, THIS SECURITY CLEARANCE THING WAS CONSPIRED BY SUSAN KAMLET AND THIS MAN HERE. THERE [p. 9] WAS NEVER ANY SECURITY – I WAS NEVER SENT BACK FOR SECURITY REASONS. ONLY AFTER I FILED RACIAL DISCRIMINATION, RACIAL DISCRIMINATION WAS FOUND.

THEY KNEW THAT THEY COULDN'T – WHEN THE CAPTAIN OF THE KILAUEA SAID THAT I WAS A THREAT TO SECURITY OF THIS COUNTRY, WHERE IS THE – WHERE IS THE THREAT? I'M NO HARM TO THIS COUNTRY.

THERE'S NOTHING IN THE RECORDS THAT I'M A THREAT TO THE UNITED STATES. BUT THIS MAN

AND THIS LADY IS – IS BOTH SAYING – THIS IS WHAT THEY'RE BOTH SAYING. THIS IS WHAT THEY'RE BASING THIS CASE UPON, THAT I'M A THREAT TO THE SECURITY OF THE UNITED STATES.

NOW, WE NOTICE THAT . . . IN THIS CASE, FILED JUNE THE 12TH, HE SENT ADDITIONAL PAPERS HERE, WAR AND NATIONAL DEFENSE.

WHAT'S MY CASE WITH RACIAL DISCRIMINATION GOT TO DO WITH WAR AND NATIONAL DEFENSE?

THE COURT: BECAUSE THE QUESTION – THE PROBLEM IS, MR. BRAZIL, IF THE NAVY HAS MADE A DECISION THAT YOUR SECURITY CLEARANCE SHOULD BE WITHDRAWN FOR SECURITY REASONS, IT GETS INTO THE QUESTION OF WHAT POWER I HAVE TO REVIEW THAT DECISION. THAT'S WHAT THAT PERTAINS TO.

MR. BRAZIL: ALL RIGHT, THEN, YOUR HONOR. LET ME READ FURTHER HERE.

INCLUDED IN THIS MEMORANDUM HERE IS TOP SECRET EXECUTIVE OFFICE OF THE PRESIDENT. IT GOES ALL THE WAY FROM THE VICE PRESIDENT ALL THE WAY DOWN TO THE SECRETARY OF THE NAVY.

[p. 10] NOW, WE KNOW THAT THE SECRETARY OF THE NAVY – SECRETARY OF THE NAVY HAS BEEN MY CASE – THEY'VE GOT MY CASE AGAINST THE SECRETARY OF THE NAVY. WE KNOW NOW THAT THE SECRETARY OF THE NAVY HAS BEEN INVOLVED IN THIS TAIL HOOK OPERATION AND THAT THE

REASON WHY HE RESIGNED, HE WAS GOING TO BE FIRED. WE ALL KNOW THAT, UNDERSTAND?

SO WHAT I'M SAYING IS, HOW CAN THESE PEOPLE – I MEAN, HOW CAN I BE DENIED DUE PROCESS OF LAW TO BRING MY CASE TO TRIAL? THE LAWS SAYS I AM ENTITLED. MY – MY LIBERTY RIGHTS HAVE BEEN VIOLATED.

THE LIBERTY RIGHTS, ACCORDING TO THE CONSTITUTION, STATES THAT I AM ENTITLED TO PURSUE MY OCCUPATION. THESE PEOPLE HAVE DENIED ME THAT RIGHT. NOW, THE DUE PROCESS SAYS THAT. I MEAN, THEY'RE NOT ENTITLED TO VIOLATE MY RIGHTS. DUE PROCESS AFFORDS ME THAT RIGHT, AND I AM BEING DENIED.

THE COURT: ALL RIGHT.

ALL RIGHT. WE'RE HERE FOR THE REARGUMENT OF THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT. I ASKED THE DEFENDANT FOR FURTHER BRIEFING ON THE QUESTION OF THE DISCRETIONARY EXERCISE OF SECURITY CLEARANCE DETERMINATIONS BY THE DEPARTMENT OF THE NAVY AND THAT WAS – HAS BEEN PROVIDED FOR ME.

PLAINTIFF WAS ASSIGNED TO A NAVAL VESSEL, THE U.S. NAVAL SHIP KILAUEA, WHICH WAS – HAD NUCLEAR CAPABILITY AND ALL PERSONS ABOARD WERE REQUIRED TO HOLD SECURITY CLEARANCES.

[p. 11] MR. BRAZIL ASSERTS THAT HE WAS DECERTIFIED FROM SECURITY CLEARANCE BECAUSE OF HIS RACE AND COLOR, AND HE

BRINGS A DISCRIMINATORY ACT – DISCRIMINATION ACTION UNDER TITLE VII.

THE DEFENDANT, OF COURSE, CLAIMS THAT MR. BRAZIL WAS NOT DECERTIFIED BECAUSE OF RACE BUT WAS DECERTIFIED FOR OTHER SECURITY REASONS AND HAS STATED THE REASONS, BUT WE NEED NOT GET INTO THOSE.

DEFENDANT HAS MOVED FOR SUMMARY JUDGMENT ON THE GROUNDS THAT MY JURISDICTION IS LIMITED UNDER A LINE OF SUPREME COURT CASES, WHICH I WILL REFER TO IN A MOMENT.

NOW, FIRST OF ALL, TREATING THIS CASE AS PURELY A TITLE VII CASE, THAT IS, A STATUTORY CASE, WHICH I THINK HAS TO BE THE FIRST STEP IN THE ANALYSIS, THE AUTHORITY FOR THE NAVY'S DECISION TO REVOKE SECURITY CLEARANCES COMES FROM THE EXECUTIVE BRANCH OF THE GOVERNMENT.

THE AUTHORITY IS VESTED IN THE PRESIDENT WHICH HE IN TURN DELEGATES TO THE DEPARTMENT OF DEFENSE AND DOWN THROUGH THE DEPARTMENT OF NAVY TO THE MORE EXPLICIT COMMANDERS.

THE PROBLEM WITH A TITLE VII CLAIM HERE IS THAT THERE IS NOW A LINE OF TWO U.S. SUPREME COURT CASES AND ONE NINTH CIRCUIT CASE AND AT LEAST ONE CIRCUIT – ONE DISTRICT COURT CASE FROM ANOTHER DISTRICT SAYING THAT THIS COURT HAS VERY LIMITED, IF ANY, POWER TO REVIEW THE MERITS OF SECURITY CLEARANCE

REVOCATIONS. THAT'S *DEPARTMENT OF THE NAVY AGAINST EGAN* AND [p. 12] *WEBSTER VS. DOE* IN THE U.S. SUPREME COURT, *DORFMONT AGAINST BROWN* IN THE NINTH CIRCUIT, AND *PETERSON AGAINST THE DEPARTMENT OF THE NAVY* IN THE DISTRICT COURT IN NEW HAMPSHIRE.

THE BASIC PROBLEM OR PRINCIPLE IS THAT, WITH A PLAINTIFF ALLEGING DISCRIMINATION AND THE MILITARY AUTHORITY SAYING, "NO, IT'S SECURITY," SOMEBODY'S INTERESTS HAVE TO BEND HERE.

AND THE COURTS HAVE SAID THAT THE CONCERN OVER SECURITY AND THE POWERS CREATED BY THE EXECUTIVE OR VESTED IN THE EXECUTIVE WITH RESPECT TO THE SECURITY CAN'T BE OVERCOME SIMPLY BY AN ALLEGATION AND CHARGES OR EVEN PROOF OF ILLEGAL RACIAL DISCRIMINATION.

I DON'T BELIEVE THAT I HAVE THE POWER – THE POWER UNDER TITLE VII TO REVIEW THE MERITS OF THE AGENCY'S DECISION, THAT IS, THE DEPARTMENT OF THE NAVY'S DECISION. I THINK THE DECISION – THESE TWO DECISIONS OF THE SUPREME COURT AND THE – AT LEAST THE DECISION OF THE NINTH CIRCUIT IN *DORFMONT* HAVE TAKEN THAT POWER AWAY FROM ME.

MR. BRAZIL: I –

THE COURT: THE EXECUTIVE'S COMPELLING INTEREST IN NATIONAL SECURITY HAS BEEN

HELD TO BE THE CONTROLLING FEATURE THAT THIS COURT MUST FOLLOW.

NOW, I EVEN EXPANDED OUT, FOR MR. BRAZIL'S BENEFIT, MY ANALYSIS OF THIS TO INCLUDE A QUESTION OF, WELL, DOES HE STILL HAVE A CONSTITUTIONAL CLAIM, THAT IS, AN EQUAL PROTECTION CLAIM APART FROM THE ANALYSIS UNDER TITLE VII?

[p. 13] THE SUPREME COURT AND THE NINTH CIRCUIT HAVE SORT OF LEFT OPEN THE ISSUE OF WHETHER DISTRICT COURTS MAY HEAR CONSTITUTIONAL CLAIMS RELATING TO SECURITY CLEARANCES. WE HAVE, AGAIN, *WEBSTER*. WE HAVE *DORFMONT*. WE HAVE ALSO IN THIS CIRCUIT *DUBBS AGAINST THE CIA* AND *HIGH TECH GAYS AGAINST DISCO* (PHONETIC).

I'VE ALSO LOOKED BROADER, AND THAT IS BROADER THAN THE SPECIFIC QUESTIONS HERE, AND LOOKED AT ANOTHER SUPREME COURT CASE, *CHAPMAN AGAINST WALLACE*, AND *FERERS* – F-E-R-E-R-S – *AGAINST THE UNITED STATES* AND *HAIG AGAINST AGEE*, U.S. SUPREME COURT DECISION, AND ANOTHER FEDERAL CIRCUIT CASE – I SHOULD SAY DISTRICT COURT – DISTRICT OF COLUMBIA CIRCUIT COURT CASE.

MY CONCLUSION FROM ALL THIS, ALTHOUGH IT IS – IT IS NOT CRYSTAL CLEAR UNDER THE CONSTITUTION ANALYSIS, SEEMS TO ME THAT PLAINTIFF DOES NOT HAVE A RIGHT TO BRING A CONSTITUTIONAL CLAIM AGAINST A SUPERIOR OFFICER OR AGAINST THE DEPARTMENT OF THE

NAVY AND THAT I HAVE TO GO BACK TO THE TITLE VII ANALYSIS.

I DON'T THINK THAT THE DECISIONS THAT I'VE BEEN REFERRED TO HERE AUTHORIZE THE FILING OF AN ACTION BY A MILITARY PERSON SUCH AS MR. BRAZIL AGAINST HIS SUPERIORS WITH RESPECT TO THIS TYPE OF CONSTITUTIONAL CLAIM, IF HE'S EVEN ASSERTING IT.

SO, FOR THOSE REASONS, THE MOTION FOR SUMMARY JUDGMENT WILL BE GRANTED.

MR. BRAZIL: MAY I –

THE COURT: AND I WILL ASK THE DEFENDANT TO SUBMIT A PROPOSED FORM OF ORDER –

[p. 14] MR. BRAZIL: I CANNOT BELIEVE THIS.

THE COURT: – AND A PROPOSED FORM OF JUDGMENT.

THE ORDER NEED NOT RECITE ALL THE REASONS I'VE STATED BUT SHOULD REFER TO THE RECORD – OR IT SHOULD REFER TO THE FACT THAT MY REASONS ARE STATED ON THE RECORD.

MR. BRAZIL, I KNOW YOU'RE DISAPPOINTED BY THIS; IN FACT –

MR. BRAZIL: YOUR HONOR –

THE COURT: PERHAPS EVEN ANGRY –

LET ME FINISH, PLEASE, MR. BRAZIL.

– EVEN ANGRY, BUT I HAVE TO LIVE BY THE LAW, AND THIS IS WHAT THE CASES TELL ME.

THESE ARE WHAT THE STATUTES TELL ME, AND I CAN'T DO ANY MORE ABOUT IT.

I'VE GIVEN THIS CASE AN EXTRA MEASURE OF WORK ON YOUR BEHALF. I CALLED FOR RE-BRIEFING. MY CLERKS AND I HAVE TRIED TO APPROACH THIS CASE FROM YOUR POINT OF VIEW TO SEE IF WE COULD HELP YOU OUT. BUT I JUST DON'T THINK THE LAW ALLOWS IT.

MR. BRAZIL: MAY I SAY SOMETHING, YOUR HONOR?

THE COURT: OF COURSE.

MR. BRAZIL: YOUR HONOR, I CANNOT UNDERSTAND THIS. I REALLY CANNOT UNDERSTAND THIS. DISCRIMINATION WAS FOUND BY – AND YOU SAY YOU HAVE A – YOU TOLD ME ON DECEMBER 13TH THAT, IF THIS CASE COULD NOT BE SETTLED, YOU WOULD MOVE FOR TRIAL.

THE COURT: NO, I DIDN'T SAY I WOULD MOVE FOR TRIAL.

MR. BRAZIL: YOU WOULD SET THE DATE FOR TRIAL.

[p. 15] THE COURT: I WOULD SET DATES FOR GOING AHEAD. AND WE DID SET DATES FOR GOING AHEAD, AND THE SUMMARY JUDGMENT MOTION WAS RESOLVED.

MR. BRAZIL: SO YOU'RE SAYING TO ME THAT THEY HAVE EVERY RIGHT TO DO WHAT THEY DID TO ME UNDER THIS.

THE COURT: NO, SIR. NO, I'M NOT. WHAT I'M SAYING IS THAT I – THIS COURT – DO NOT HAVE THE POWER TO REVIEW THE MERITS OF THE DECISION MADE TO DENY YOU YOUR SECURITY CLEARANCE. THAT'S WHAT I'M SAYING.

MR. BRAZIL: BUT SECURITY CLEARANCE WAS NOT THE ISSUE HERE.

THE COURT: WELL, YES, IT WAS.

MR. BRAZIL: CAN I APPEAL THIS CASE?

THE COURT: YES, OF COURSE, YOU CAN.

MR. BRAZIL: I INTEND TO APPEAL BECAUSE, I MEAN, THESE PEOPLE ARE WRONG, AND I KNOW THEY ARE WRONG. AND, LIKE I SAID BEFORE, MY RIGHTS HAVE BEEN VIOLATED.

THE COURT: OKAY. THANK YOU, MR. BRAZIL.

MS. KAMLET: THANK YOU, YOUR HONOR.

MR. SCIULLI: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED AT 10:30 A.M.)

* * *

[p. 16] CERTIFICATE OF REPORTER

I, CANDACE L. FRANCIS, OFFICIAL REPORTER FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES

NUMBERED 1 THROUGH 16, INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

DECEMBER 21, 1992

/s/ CANDACE L. FRANCIS
CANDACE L. FRANCIS, CSR

APPENDIX E

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

Ernest Brazil, Appellant, v. H. Lawrence Garrett, III, Secretary, Department of the Navy, Agency.	Appeal No. 01911069 Agency No. DON-90-62383-004

DECISION

INTRODUCTION

On January 2, 1991, Ernest C. Brazil (hereinafter referred to as appellant) filed an appeal to the Equal Employment Opportunity Commission (EEOC) from the final decision of the Department of the Navy, Military Sealift Command, Pacific (hereinafter referred to as agency) received on December 14, 1990, concerning his equal employment opportunity (EEO) complaint which alleged discrimination based on his race (Afro-American) and color (black) in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. This appeal is accepted for decision by the Commission in accordance with EEOC Order No. 960, as amended.

For the reasons that follow, the agency's decision is AFFIRMED.

ISSUE PRESENTED

Whether appellant has proven, by a preponderance of the evidence, that he was discriminated against on the bases of his race (Afro-American) and his color (black) when he was repatriated from the USNS Kilauea on May 18, 1989 for his involvement in an altercation with another mariner while in public.

CONTENTIONS ON APPEAL

On appeal, appellant contests the final agency decision in its entirety on its merits. Appellant alleges on appeal that the processing of his EEO complaint was discriminatorily delayed.

BACKGROUND

On December 15, 1989, appellant filed a formal EEO complaint alleging that agency officials discriminated against him on the bases of his race (Afro-American) and color (black) when he was repatriated from the USNS Kilauea on May 18, 1989, as a result of his involvement in an altercation with another mariner in public. The agency accepted the issue and conducted an investigation. The investigator concluded that the agency's articulated reasons for repatriating appellant were shown by appellant to be, by a preponderance of the evidence, pretextual in nature and not worthy of credence. The investigator recommended a finding of discrimination based on race. The agency issued a proposed disposition finding the agency's articulated reasons for repatriation to be legitimate and nondiscriminatory. Appellant did not request a

hearing on the matter. On December 10, 1990, the agency issued its final decision adopting the recommendation of the proposed disposition and finding no discrimination with respect to appellant's complaint. It is from this decision that appellant now appeals.

At the time of the events at issue, appellant was employed by the agency as a Wiper on the USNS Kilauea, beginning on November 21, 1988. Investigative Report (IR) Ex. 2. On May 9, 1989, while the ship was docked in Subic Bay, Republic of the Philippines, appellant and an Asian Second Electrician (hereinafter electrician) became involved in a fist fight in the city of Olongapo. IR Ex. 6. Both the military police and the local police were called in. Both parties to the fight were given memos dated May 12, 1989, by the ship's Master constituting verbal reprimands in connection with the incident. IR Ex. 14, 15. The electrician, who was recognized as the instigator of the fight, was given leave and allowed to report back to the ship. It is not clear from the record whether his leave ended on May 12, 1989, or began on that date. IR Exs. 13, 19. On May 13, 1989, appellant was paid off the ship and told to report to MSCPAC. IR Ex. 19. Appellant alleges that this disparate treatment of the two parties following the altercation is motivated by race/color (black) discrimination.

The agency asserts that appellant's repatriation was the result of the ship's Master's (hereinafter Master) doubts regarding appellant's continued qualification for certification in the Nuclear Weapon Personnel Reliability Program (PRP). IR Exs. 20, 21, 22. The EEO Counselor's Report reflects that appellant was not fully qualified for the PRP program when he was sent to the ship on

November 21, 1988. IR Ex. 2. The Master, in his administrative message to COMSCPAC, Oakland, California, dated May 18, 1989, enumerates the following reasons for appellant's failure to continue to qualify under the PRP:

1. (Appellant) has been disciplined for violating merchandise control regulations.

2. (Appellant) received a verbal reprimand for being involved in a physical altercation in Olongapo City, Republic of the Philippines, requiring the attention of local and military police officers.

3. Local Philippine government proceedings were brought against appellant for sexual misconduct with a Philippine national minor. The proceedings were concluded after an unconfirmed cash payoff.

4. Appellant recently received an unsatisfactory performance evaluation.

5. On May 13, 1989, appellant approached the Master with grievances that he had not fully discussed with his department head. Appellant was instructed to discuss his problems with the Chief Engineer prior to bringing them to the Master's level. Appellant was informed that his problems would be addressed through the grievance procedure, but that the informal aspects of the procedure must first take place pursuant to the written guidelines of the negotiated grievance procedure. Appellant failed to discuss any problems with the Chief Engineer. On May 15, 1989 appellant approached the Master to file charges against other members of the ship's crew for misconduct. Appellant was informed that all aspects of his complaint would be addressed in

> the proper forum in accordance with established regulation if he desired to follow the proper procedure. Appellant refused to accept a written copy of the grievance procedure.

IR Ex. 20.

The Master's personal assessment of appellant's personality is also recorded in his memo of May 19, 1989, regarding appellant's suitability for PRP as follows: "My own observations of (appellant) leads me to believe that in addition to his maladjustment in dealing with the local working and social environments . . . , he suffers from some sort of significant paranoid disorder as witnessed by his interaction with the members of the ship's force and the Master. It is recommended that (appellant) receive some sort of psychiatric evaluation and not be reassigned to the Philippine area on future shipboard assignments."

OPNAV Instruction 5510.162 (5) outlines the agency's policy regarding PRP as follows:

> a. It is Department of Defense (DOD) and DON policy to ensure that nuclear weapons are not subject to loss, theft, sabotage, unauthorized use, unauthorized destruction, accidental damage, or jettison. The national security and welfare require, therefore, that only those personnel who have demonstrated unswerving loyalty, integrity, trustworthiness and discretion of the highest order will be employed to assure the highest possible standards of individual reliability in personnel performing duties associated with nuclear weapons and nuclear components. This assurance is accomplished

> through careful screening and selection, education, and continuous evaluation of personnel assigned, and prompt removal of personnel from the PRP who no longer meet the high standards prescribed.

IR Ex. 8.

The Master stated, in his affidavit regarding his implementation of PRP:

> All crew members of the USNS Kilauea must maintain personnel reliability program qualifications in accordance with MSCPA Instructions C81-20.1B(sic) Any time there is an infraction of the Ship's Standing Orders, I process the matter in accordance with the CMPI and evaluate the incident under PRP standards.
>
> (Appellant's) verbal reprimand was due to his involvement and not based on his innocence or guilt.
>
> (Appellant) was repatriated because of his inability to maintain personnel reliability program behavior standards. Master USNS Kilauea letter Ser. 091 dated 19 May 89 delineates the reasoning behind his uncertifiability.

IR Ex. 25.

The Master's letter dated May 19, 1989, to the Commander Military Sealift Command Pacific refers to the same incidents as grounds for decertifying appellant from the PRP as set forth previously in the Master's memo of May 18, 1989 COMSPAC, Oakland California. IR Ex. 21.

On February 12, 1989, appellant was apprehended at the main gate of the base for attempting to exit with assorted

and excessive tax free items with a property pass that did not specifically indicate the items. Appellant was disciplined on March 6, 1989, for violating Merchandise Control Instructions and his tax-free privileges were suspended for six months effective February 12, 1989. IR Ex. 11. Appellant, in a statement made at the time he was apprehended on February 12, 1989 stated, "I was not fully aware of the amounts that could be carried off the base if it is used for personal use and personal use only." IR Ex. 11. On March 1, 1989 appellant was issued a letter of reprimand for: VIOLATION OF SCHEDULE OF CHARGES #8, SHIP'S ORDER #3: "CREW MEMBERS SHALL COMPLY WITH ALL LOCAL PORT REGULATIONS, INSTRUCTIONS AND LAWS EMITTING FROM RESPONSIBLE AUTHORITY AND PUBLISHED TO THE CREW." IR Ex. 12.

In early 1989, appellant was charged with simple seduction by the city of Olongapo. This charge involved allegations that appellant had sexual intercourse with a Philippine national minor on several occasions after having proposed marriage to her. The charges were dismissed on April 24, 1989, with a finding that appellant had not deceived the minor by promising marriage in return for sexual intercourse. IR Ex. 27.

On May 9, 1989, the physical altercation precipitating appellant's formal complaint occurred. Both parties in the altercation were given verbal reprimands. IR Exs. 14, 15. Appellant brought a charge of slander by deed against his assailant in the city of Olongapo on May 17, 1989. IR Ex. 13.

On May 13, 1989, appellant attempted to file charges with the Master against two of his shipmates. IR Exs. 16, 17. Appellant charged his May 9 assailant, the electrician, with attempting to involve him in a physical altercation earlier the same day, by assaulting him and calling him a homosexual. Appellant charged the electrician with "[T]his willfully (sic) and malicious attempt to endanger my employment with M.S.C. and for his unprovoked assault on my person (sic). IR Ex. 16. In his second charge, appellant accused a junior engineer with making false and malicious statements about him involving a Filipino minor despite the fact that all charges against him had been cleared. Appellant alleged damage to his reputation. IR Ex. 17.

On May 15, 1989, appellant attempted to file a third charge with the Master involving a shipmate who was dispatched to the Olongapo police station on May 10, 1989, to pick up the police report regarding the May 9 incident involving appellant. Appellant alleged that the shipmate made no attempt to obtain the document, but instead proceeded to make false statements about appellant's conduct aboard ship. IR Ex. 18.

In a statement dated June 23, 1989, to the Head, Marine Placement and Receiving Branch, on the subject of appellant's contemplated decertification from PRP, appellant set forth an explanation of several of the incidents constituting the grounds for his contemplated decertification. First, he states that the charges against him are all lies. IR Ex. 23. With respect to the simple seduction charges, appellant stated: "There was never any sexual misconduct on my behalf with a Philippine minor. I had nothing

to do with the girl or attempted to do anything. This was the work of the Jr. Engineer,. . . . "

Regarding the charge of attempting to exit the base with excessive amount of tax-free items, appellant asserts that he was "set up" by a 3 A/E shipmate who paid off the Philippine Marine Guard at the gate to detain him. Appellant states that this action was in retaliation for an earlier "disrespectful incident." Appellant does not elaborate as to the motive of the disrespectful incident. Appellant asserts that he was reprimanded for the excessive tax-free property incident instead of a more serious discipline because he had knowledge concerning an officer writing his own property pass for a television.

Addressing the May 9 physical altercation, appellant states that his assailant had attempted to involve him in a fight on the ship on the morning of the same day that he assaulted appellant in town. Appellant states that his part in the altercation was just defending himself. Appellant states that the ship's Master told him he should have walked away from the fight. IR Ex. 23. Appellant states that the Master would not allow him to file a complaint or charge against the people involved in the alleged incidents.

ANALYSIS AND FINDINGS

Title VII of the Civil Rights Act of 1964, as amended, forbids an employer from using race, color, sex, religion, national origin or reprisal as a motivating factor in an adverse employment action. The United States Supreme Court has firmly established the framework by which the factual issue of the agency's motivation is resolved.

Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875 (1984); *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-6 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-6 (1981); *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

Appellant bears the initial burden of establishing a *prima facie* case of discrimination by producing evidence to show: (1) that he is a member of a statutorily protected class; (2) that he engaged in conduct similar to that of employees outside his protected class; and (3) that he was disciplined more harshly than other similarly situated employees not of his protected class. *Moore v. City of Charlotte, N.C.*, 754 F.2d 1100, 1105-06 (4th Cir. 1985), *cert. denied*, 472 U.S. 1021 (1985); *Mosley v. General Motors Corp.*, 497 F.Supp. 583, 589 (E.D. Mo. 1980), *aff'd* 691 F.2d 504 (8th Cir. 1982); *Worthy v. United States Steel Corp.*, 616 F.2d 698 (3rd Cir. 1980).

Once appellant has established a *prima facie* case, the agency may rebut this inference of unlawful discrimination by articulating legitimate, nondiscriminatory reasons for its actions. *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 577-78 (1978). The burden is upon appellant to prove, by a preponderance of the evidence, that the reasons given by the agency for its action were not the true reasons, but a pretext for discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 804. The appellant may show pretext by demonstrating that, despite the reasons given, it is more likely than not that the agency was motivated by discrimination, or that the reasons given for the agency's actions are simply not believable. *Burdine*, 450 U.S. at 256.

The Commission finds that appellant has raised a *prima facie* case of race/color discrimination. Appellant has shown that he is a member of a statutorily protected class; that he engaged in conduct similar to that of employees outside of his protected class, the conduct of fighting; and that he was disciplined more harshly than other similarly situated employees not of his protected class. Appellant was repatriated after the altercation while his assailant (Asian) was reprimanded and given leave.

The burden of persuasion now shifts to the agency to articulate a legitimate, nondiscriminatory business reason for its action of repatriating appellant. The agency position is that appellant was repatriated not for being involved in a physical altercation, but rather as the culmination of a number of incidents which called into question his ability to participate in the PRP. The Master stated that appellant has failed to exhibit good social adjustment and emotion stability as evidenced by the following incidents:

1. Appellant's discipline for violation of the merchandise control regulations;

2. Appellant's verbal reprimand for his participation in a physical altercation in a port city regarding the attention of military and local police;

3. Appellant's involvement in local government proceedings involving charges of sexual misconduct with a Philippine minor which were dismissed after an unconfirmed payoff;

4. Appellant's unsatisfactory performance appraisal of May 16, 1989;

5. Appellant's attempt on May 13, 1989 to file charges against his shipmates with the Master without first discussing his grievances with the Chief Engineer;

6. Appellant on May 15, 1989 again, approached the Master wanting to file charges against other crew members for their alleged misconduct. He was informed that his complaints would be dealt with in the proper forum. He refused a written copy of the grievance procedure offered to him.

We find, that given the nature of appellant's assignment on a nuclear vessel, the Master's decision to repatriate appellant for possible decertification from the PRP is a legitimate, nondiscriminatory business reason in light of the history of his conduct in the approximately six months he was assigned to the ship.

The burden of persuasion is on appellant to prove that the agency's articulated legitimate, nondiscriminatory business reason is unbelievable, or pretextual in nature, masking the agency's motivation to discriminate against appellant based on his race/color. As with the establishment of a *prima facie* case, proof of pretext will vary with each employment situation at issue. *See Furnco Construction Corp. v. Waters*, 438 U.S. 567, 580 (1978); *EEOC v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984); *Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77, 80 (3d Cir. 1983). Employers generally have broad discretion to set policy and carry out personnel decisions, and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. *Burdine*, 450 U.S. at 259. Consequently, even if more than one conclusion can be drawn from the evidence, the agency's decision is to be upheld if its conclusion is

supported by substantial evidence. *Stevens v. Stubbs*, 576 F.Supp. 1409, 1413 (N.D. Ga. 1983) *citing Deutsch v. Atomic Energy Commission*, 401 F.2d 404 (D.C. Cir. 1968).

After a careful review of the record we find that appellant has not presented sufficient evidence to show that the agency's articulated legitimate, nondiscriminatory business reason is unbelievable or is pretextual.

Appellant's first argument is that the legitimate, nondiscriminatory business reason, repatriating appellant was pretextual. Appellant argues that the fact that appellant's Asian assailant who was responsible for starting the fist fight, received the same discipline as appellant, a verbal reprimand, is evidence of race discrimination. Appellant asserts that there should have been an effort by the Master to ascertain who deserved the primary blame for the incident and appellant implies that the participants should have been disciplined according to fault. The agency asserts that the reprimands were given for involvement, not guilt or innocence. We note that appellant has presented no evidence of other physical altercations where the man who has struck the first blow has been disciplined more severely. Nor has appellant presented any evidence of shipboard disciplinary policy which requires that the first assailant be more severely disciplined than one who merely participates in a fist fight. The agency asserts that it was the Master's judgment that appropriate behavior for appellant would have been to walk away from the fight. The agency states that the physical altercation taking place in the middle of a port city, requiring the intercession of military and local police, reflects negatively on the ship.

Appellant argues his disparate treatment in the matter of discipline for violating Merchandise Control Restrictions. He asserts that he is the only black to have been recommended for decertification for the violation of these restrictions with no prior disciplinary record whereas those involved in much more serious and extensive violations of the rules were less severely disciplined. The agency, on the other hand, asserts that it was not for this isolated infraction of the rules that appellant's decertification was recommended. Other incidents in which appellant was involved caused the Master to recommend appellant's decertification.

Appellant further asserts that it was not until appellant attempted to file charges regarding the altercation incident that the Master prepared and forwarded his administrative message regarding appellant. We note that the administrative message indicates that it was appellant's repeated refusal to "go through channels" regarding his complaints and follow the requirements of the written grievance procedure, in addition to the other incidents enumerated which placed appellant's PRP eligibility in question. The Master states that he instructed appellant as to the proper procedures and offered him a written copy of the grievance procedure which he refused. Appellant, on two occasions, brought his complaints regarding shipmates directly to the Master, rather than going through the proper procedures, as instructed.

Appellant alleges that in addition to his disparate discipline for being involved in a fist fight, the electrician involved was shielded from entanglement in local government legal proceedings initiated by appellant. We do not find evidence in the record to support this allegation.

Appellant did not file legal proceedings with the local government until May 17, 1989, according to the record. It is unclear from the record as to whether the electrician returned to the ship on May 12, 1989 or was given leave as of that date. Regardless, there is no evidence to show that the agency's granting the electrician leave coincides with any agency knowledge of appellant filing legal proceedings against him.

Appellant further states that the Master's reliance on appellant's involvement in a simple seduction charge brought in the Philippines to support its repatriation of appellant is misplaced. Appellant states that the agency made no attempt to investigate or discipline him for the alleged misconduct and that the charges were later dropped. The agency states that it is not required, under PRP regulations, to wait until a questionable individual actually violates a law before removing him. PRP provides that the Master has the discretion to draw on his expertise to make such decisions. There is no question, based on the record, that appellant was charged with simple seduction and that the charges were later dismissed. Such involvement in the legal system we find may have reasonably caused the Master to doubt appellant's integrity and trustworthiness.

Appellant also asserts that the agency wrongfully used his unsatisfactory performance evaluation of May 16, 1989, as justification for repatriating him on May 18, 1989. Appellant states that the unsatisfactory rating came as a surprise to him, and was given to him without advance warning or counseling attempts to improve his deficiencies as required by agency regulations. The agency concedes that the unsatisfactory rating "reflects the problems

with appellant's performance rather than providing an altogether separate basis for repatriating appellant." Agency Reply Brief at 10.

Appellant also asserts that the Master was not qualified to rate him in an unbiased manner due to his personal animus towards appellant. Appellant cites the Master's assessment of appellant's mental health, explaining appellant's actions as resulting from a "significant paranoid disorder" as an example. We note that appellant was rated by his department head and the evaluation was signed by the Master. Appellant has not shown evidence of any undue influence exercised by the Master over the department head who made the evaluation. The agency asserts that appellant may have received better evaluations on other ships because they were not run as tightly as the USNS Kilauea.

Appellant was examined by a licensed psychologist on January 24, 1990 who reported that appellant did not suffer from a paranoid disorder. The psychologist indicates that appellant's emotional responses were appropriate considering the rash of problems he had been experiencing. The agency asserts however, that such responses are not consistent with emotional stability and the type of rational response to adverse situations necessary for PRP certification. The agency in its reply brief supplies evidence that the Master has made similar psychological assessments regarding white crew members whom he disciplined.

The agency argues that its repatriation must be viewed in light of the PRP regulations on the ship. PRP certification involves national security and the agency asserts that the

Master's reasons for his actions should be viewed in light of his responsibility to ensure this goal. The agency asserts that the Master's concern over appellant's conduct was within the context of whether he was reliable in terms of the PRP program. We find that this is a legitimate, nondiscriminatory business reason for appellant's repatriation after a number of significant incidents occurred within a six month period casting doubt upon appellant's reliability. Appellant has failed to supply evidence which proves that the reasons for his repatriation were unbelievable or pretextual, masking a racial motivation for appellant's repatriation.

CONCLUSION

Based upon a thorough review if [sic] the record, and for the foregoing reasons, it is the decision of the Equal Employment Opportunity Commission to affirm the final agency decision in this matter, finding no discrimination.

STATEMENT OF RIGHTS - ON APPEAL

RIGHT TO REQUEST REOPENING (M0391)

The Commission may, in its discretion, reopen and reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law or regulation or misapplication of established policy; or

3. The decision is of such exceptional nature as to have effects beyond the actual case at hand.

Requests to reopen, with supporting arguments or evidence, *MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS* of the date you receive this decision, or within twenty (20) calendar days of the date you receive a timely request to reopen filed by another party. Any argument in opposition to the request to reopen or cross request to reopen *MUST* be submitted to the Commission and to the requesting party *WITHIN TWENTY (20) CALENDAR DAYS* of the date you receive the request to reopen. *See* 29 C.F.R. § 1613.235. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reopen shall be deemed filed on the date it is received by the Commission.

RIGHT TO FILE A CIVIL ACTION (S0391)

You have the right to file a civil action in an appropriate United States District Court *WITHIN THIRTY (30) CALENDAR DAYS* of the date that you received this decision, unless within that time you decide to file a request to reopen. The limitations period for filing a civil action under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (ADEA) may differ from the period set out for the filing of civil actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 791. You may be foreclosed from filing a civil

action on any claim brought under the ADEA if you fail to file within the limitations period applied by the Court in the jurisdiction in which your action is filed. If you file a civil action, **YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE.** Failure to do so may result in the dismissal of your case. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0391)

1. If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et *seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action *MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS* of the date you receive the Commission's decision.

FOR THE COMMISSION:

[May 15, 1991]
DATE

/s/ Dolores L. Rozzi, Director
Dolores L. Rozzi, Director
Office of Federal Operations

APPENDIX F

REPORT OF INVESTIGATION IN THE COMPLAINT OF MR. ERNEST C. BRAZIL MILITARY SEALIFT COMMAND, PACIFIC, OAKLAND, CALIFORNIA

I. INTRODUCTION

A. Mr. Ernest C. Brazil (Complainant) is employed at Military Sealift Command, Pacific, Oakland, California (Activity) as a Wiper, 460-64-4488.

B. On 12 June 1989 Complainant contacted the Equal Employment Opportunity (EEO) Office at the Activity and filed an informal complaint of discrimination.

C. Precomplaint counseling began on 18 July 1989 and was concluded on 15 December 1989. A Notice of Final Interview With EEO Counselor was issued on 15 December 1989 (Exhibit 1). The Counselor's Report on this matter is at Exhibit 2. Complainant filed a formal complaint of discrimination on 15 December 1989 (Exhibit 3). The Notice of Receipt of Discrimination Complaint was acknowledged on 5 January 1990 (Exhibit 4). Complainant's allegations of discrimination was accepted on 2 February 1990 (Exhibit 5).

D. The specific allegations accepted for investigation (Exhibit 5) follows [sic]:

"Because of your race (Afro-American) and color (Black) you were repatriated from the USNS KILAUEA on 18 May 1989 for your involvement in an altercation with another mariner while in Subic".

E. Complainant identified Bruce P. Butterfield and Chief Engineer Gordon Catron as the Responsible Management Officials (Exhibit 6).

F. Complainant named attorney David Handsher as his representative.

G. Complainant requests the following corrective actions if discrimination is found (Exhibit 6);

1. receive backpay and the overtime that he would have accumulated while aboard the USNS KILAUEA from the date of removal to present;

2. Mr. Olaes be removed from the ship and returned to U.S.A [sic];

3. his personnel records be expunged:

4. that he be given a letter of apology from Captain Butterfield and Chief Engineer Catron;

5. be reinstated in the PRP Program; and

6. be awarded punitive damages and attorney fees.

H. The subject complaint was assigned to Mr. Raymond P. Andrade on 7 February 1990 (Exhibit 7).

II. EXAMINATION OF PROCEDURE

OPNAVINST 5510.162 (EXHIBIT 8) and MSCPACINS 12430. 3F (Exhibit 9) were reviewed. No procedural defects were noted with regard to OPNAVINST 5510.162. However, procedural defects were noted with regard to MSCPACINST 12430. 3F. These defects are noted under Examination of Management's Articulated Reasons to Determine Whether Pretext is Present.

III. SURVEY OF THE GENERAL ENVIRONMENT

The PRP Decertification Log (Exhibit 10) submitted by the Activity show [sic] that during the period 87/05/09 through 89/07/26 eight (8) civilian mariners were decertified from the program. The racial ethnicity of these employees are as follows:

3 (Asian)
1 (Black)
4 (White)

IV. FINDINGS OF FACT AND ANALYSIS

A. Findings of Fact

1. On 6 March 1989, Complainant was told that he had violated the Merchandise Control Instructions and that his tax-free privileges are suspended for a period of six months effective 12 February 1989 (Exhibit 11).

2. Captain Butterfield issued the Complainant a letter of reprimand for . . . . VIOLATION OF SCHEDULE OF CHARGES #8, SHIP'S ORDER # 3: CREWMEMBERS SHALL COMPLY WITH ALL LOCAL PORT REGULATIONS AND LAWS EMANATING FROM RESPONSIBLE AUTHORITY AND PUBLISHED TO THE CREW" [sic] (Exhibit 12).

3. On May 9, 1989, Complainant was engaged in an altercation with a shipmate (Mr. Roger Olaes) in the city of Olongapo, Republic of the Philippines (Exhibit 13).

4. On 12 May 1989, Complainant and Mr. Olaes each received a Verbal Reprimand (Exhibits 14 and 15).

5. On 13 May 1989, Complainant attempted to file charges with Captain Butterfield against Mr. Olaes and Mr. John Duerst Jr. Engineer (Exhibits 16 and 17).

6. On 15 May 1989, Complainant attempted to file charges against Mr. Seabrook alleging that Mr. Seabrook had made false statements about his conduct aboard the Kilauea (Exhibit 18).

7. On 18 May 1989, Complainant was paid off the ship and told to report to MSCPAC but Mr. Olaes was allowed to remain (Exhibit 19).

8. Captain Butterfield forwarded two letters to COMSCPAC Oakland (Exhibits 20 and 21). One letter stated that Complainant is instructed to report to COMSCPAC first working day after arrival CONUS for failure to continuously qualify under the requirements of the Personnel Reliability Program and that his own observation of Complainant leads him to believe that in addition to Complainant's maladjustment in dealing with local working and social environments, Complainant suffers from some sort of significant paranoia disorder. Captain Butterfield recommends that Complainant receive some sort of Psychiatric evaluation. In the other letter Captain Butterfield requests that Complainant be interviewed by the MSCPAC Security Officer and Staff Ordinance Officer looking towards a determination of Complainant fitness to participate in any program where PRP qualifications are a prerequisite for assignment.

9. By letter dated 12 June 1989, Complainant was notified that his permanent decertification from the PRP was being contemplated (Exhibit 22).

10. Complainant responded to the letter on 23 June 1989 denying all charges (Exhibit 23).

11. By letter dated 03 October 1989, Complainant was permanently decertified for duty under the Personnel Reliability Program (Exhibit 24).

B. Analysis

1. Legal Standards

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, provides:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

(Title 42 United States Code, Section 2000e-2(a)(1)

It is within this statutory framework that Complainant's allegation of discrimination must be analyzed. The analysis requires an examination of the findings of fact to determine whether Complainant who has the burden of proof, has established a *prima facie* case of impermissible discrimination. If Complainant has met that burden, then the findings of fact must be analyzed to determine whether the activity has articulated a "legitimate, nondiscriminatory reason" for its action and has presented evidence to support that articulated reason. If the activity has met its burden, then the findings of fact must be examined to determine whether the reason it offered was

not its true reason but instead a pretext for discrimination. Although, this analysis calls for a shifting of focus, the burden remains on the Complainant to prove by preponderance of the evidence that impermissible discrimination occurred.

2. Establishment of Prima Facie Case

A. Complainant in a Title VII case must carry the initial burden under the statute of establishing a *prima facie* case of discrimination based on race (Black). In order to establish a *prima facie* case of discrimination on the basis of race, Complainant must show the following:

(1) he is a member of a class protected under the statute;

(2) he was accorded different treatment from someone else who was similarly situated; and

(3) the other person was not a member of Complainant's protected class.

It is undisputed that Complainant is a member of the Black race, a class protected by title VII. He was accorded different treatment that Mr. Olaes (Asian/Pacific Islander) who was similarly situated in that the altercation with Mr. Olaes was one of the given reasons for his return to CONUS and subsequent decertification. Mr. Olaes did not receive any additional penalty other than the Verbal Reprimand. Therefore, Complainant has established a *prima facie* case of discrimination on the basis of race (Black).

3. Articulation of a Legitimate, Non-discriminatory Reason

Bruce Phillip Butterfield, Master, USNS KAWISHIWI, White male proffered the following (Exhibit 25): With respect to the verbal reprimand given to the Complainant, Captain Butterfield states that both he and Mr. Olaes were given reprimands and that the reprimands were given on the basis of involvement and not on the basis of guilt or innocence. According to the Captain, the Complainant was repatriated because of his inability to maintain Personnel Reliability Program behavior standards and that his letter Ser: 091 dated 19 May 1989 (Exhibit 21) delineates the reasoning behind Complainant's decertification.

4. Examination of Management's Articulated Reason to Determine Whether Pretext is Present

Captain Butterfield outlined several reasons as to why Complainant was discharged from the ship and sent back to CONUS with a recommendation that Complainant not be reassigned to the Philippine area on future shipboard assignments (Exhibit 20). These reasons and the examination thereof follows:

a. Complainant has failed to continuously exhibit good social adjustment and emotional stability, specifically: Complainant has been disciplined (received a Letter of Reprimand) for violation of Merchandise Control Regulations.

The record of evidence (Exhibit 11) shows that Complainant's tax-free privileges were suspended for a period of six months effective 12 February 1989 and his case administratively closed. The Captain issued Complainant a reprimand on 01 March 1989. It was not until Complainant attempted to file charges against three crewmembers on the 13th and 15th of May 1989 did the Captain prepare and forward an Administrative Message (Exhibit 20) to COMSCPAC regarding Complainant's failure to exhibit good social adjustment and emotional stability. Further, a review of the record (Exhibit 26) shows that of the four civilian mariners who were charged with the same violation as Complainant, the violations involved larger amount of merchandise and of greater dollar value than that for which the Complainant was disciplined. Further, these mariners who were recommended for decertification had previous records of disciplinary actions for other violations before being recommended for decertification. Nevertheless, the record shows that one was permanently decertified, one temporary [sic] decertified and the other two (non-Blacks) only received 14 days suspension. On the other hand Complainant who had no previous disciplinary action taken against him and who received only a reprimand for the violation was nevertheless recommended for decertification. It should be noted Complainant is the only Black mariner in the above group.

b. Complainant received a verbal reprimand for being involved in a physical altercation in Olongapo City requiring the involvement of the U.S. Facility Security Department and the local law enforcement officials.

There is no evidence in the record to show that Complainant provoked the altercation. As a matter of fact MSCPAC Employee Relations Specialist states (Exhibit 19) that the Subic Bay Police report shows that Mr. Olaes provoked the incident. Mr. Olaes received a verbal reprimand for his part in the altercation and no further disciplinary action was taken against him. However, in the Complainant's case the verbal reprimand is being used against him as evidence of his failure to qualify under the requirements of the Personnel Reliability Program.

c. Local Philippine Gov't legal proceedings were recently brought against the Complainant and recently concluded after an unconfirmed cash payoff, for sexual misconduct with a Philippine National minor.

The record shows (Exhibit 27) that the charges referred to by the Captain was [sic] dismissed on 24 April 1989. At the time of the incident the Captain made no attempt to discipline the Complainant for any misconduct.

d. Mr. Brazil has recently received an unsatisfactory performance evaluation.

The record (Exhibit 28) shows that Complainant received an unsatisfactory rating on four factors (Conduct, Ability To Get Along With Others, Over-All Progress, and Potential For Promotion). MSCPACINST 12430. 3F (4e) specifically states, "documented unsatisfactory performance must be specifically addressed in an attempt to improve and correct deficiencies". Complainant was given the evaluation on 16 May 1989 and then paid off the ship on 18 May 1989. Thus there was no attempt by

management to improve or correct Complainant's deficiencies. Further MSCPACINST 12430. 3F (4F) provides that evaluation reports shall not be used as a threat or substitute for disciplinary action. If performance is so poor as to warrant an unsatisfactory rating, the mariner being rated shall be provided with written notification that the performance is unsatisfactory and that a need for improvement is indicated. This written notice shall specify exactly what is unsatisfactory in the performance, with examples, shall explain what constitutes acceptable performances, and shall provide at least 90 days to improve. During this period, the mariner shall be provided every opportunity to improve, including, but not limited to, counseling and on-the-job training. Obviously, the Complainant was not afforded the above opportunity.

Additionally, there is some question as to the validity of Complainant's performance evaluation. Complainant provided copies of his past performance evaluations (Exhibit 29) both were satisfactory and two letters (Exhibit 30) from one of his supervisors aboard the USNS KILAUEA. One letter states that Complainant's work was satisfactory and the other letter states that he (Supervisor) would enjoy having the opportunity to work with Complainant on any other ship at any time.

e. Captain Butterfield states that his own observation of Complainant leads him to believe that in addition to Complainant's maladjustment in dealing with the local working and social environments, he suffers from some sort of significant paranoia disorder as witnessed by his interaction with other members of the ships [sic] force and the Master. Thereafter, the Captain recommends

that Complainant receive some sort of Psychiatric evaluation and not be reassigned to the Philippine area on future shipboard assignments. There is nothing in the Complainant's record to support the Captain's assertion that the (Complainant) is maladjusted in dealing with the local working or social environments. Further, Doctor Robert Kaplan, Licensed Psychologist, after examining Complainant, states (Exhibit 31) that unlike the Captain of the Kileaua, in his professional opinion, Mr. Brazil (Complainant) is not paranoid, nor does he suffer from a paranoid disorder. Dr. Kaplan sees no signs of significant disruption of mental processes or psychological deterioration that could account for the sudden rash of problems encountered by the Complainant aboard the Kileaua. As to Complainant's interaction with some other members of the ships [sic] force and the Master, the only evidence of any negative interaction with other members of the crew is that the Complainant attempted to file a grievance against three crewmembers and was told by the Captain that he would have to follow appropriate procedures. Complainant tape recorded the whole conversation he had with the Captain regarding this matter. However, since the Captain was not aware that he was being recorded, the conversation is not entered into this report.

V. CONCLUSION

Complainant met his initial burden of establishing a *prima facie* case of discrimination on the basis of race (Black). Management articulated legitimate, non-discriminatory reasons for its employment decision. However, the Complainant has shown by a preponderance of the evidence that these reasons are pretextual

and unworthy of credence. Accordingly, a finding of discrimination on the basis of race is recommended.

/s/ Raymond F. Andrade
RAYMOND F. ANDRADE,
HEAD
Naval Civilian Personnel
Center
Discrimination Complaints
Investigation
Component, Walnut Creek

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Supreme Court, U.S.
FILED
FEB 20 1996
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No. 95-957

In the Supreme Court of the United States

OCTOBER TERM, 1995

ERNEST BRAZIL, PETITIONER

v.

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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9 pp

QUESTIONS PRESENTED

1. Whether a federal employee may obtain judicial review, under Title VII of the Civil Rights Act of 1964, of the revocation of his security clearance by the Department of the Navy.

2. Whether a civilian employee of the Department of the Navy may bring a *Bivens* action based on the allegedly discriminatory revocation of his security clearance.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-957

ERNEST BRAZIL, PETITIONER

v.

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 66 F.3d 193. The order of the district court (Pet. App. 15a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1995. The petition for a writ of certiorari was filed on December 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a civilian, was employed as a wiper (janitor) with Military Sealift Command, Pacific (MSCPAC), and was assigned to USNS Kilauea. Because the Kilauea is certified to carry nuclear weapons, all crew members must be certified under the Nuclear Weapon Personnel Reliability Program (PRP), which is designed to assure the highest possible standards of individual reliability in personnel performing duties associated with nuclear weapons and nuclear components. "[O]nly those personnel who have demonstrated unswerving loyalty, integrity, trustworthiness and discretion of the highest order" will be certified under the PRP, and employees once certified are also subject to "continuous evaluation * * * and prompt removal" if they no longer meet the high standards prescribed. See Pet. App. 41a-42a (quoting OPNAVINST 5510.162(5)).[1]

The factors considered and standard applied in a PRP certification are essentially the same as those

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[1] The Master of the Kilauea also noted, in a declaration, that the Kilauea, as the only MSCPAC ship certified to tranship nuclear weapons, is "the only MSCPAC ship with a reaction force made up of crew members, who routinely arm themselves with various loaded weapons." Armed crew members are on duty at all times, and deadly force is authorized in the protection of the safety and security of nuclear weapons. The environment aboard the Kilauea is therefore "considerably more stressful than that which exists on any other ship." C.A. E.R. 29. The master believed that "the tension and stress aboard the Kilauea could exacerbate any tendencies toward erratic behavior a person may have. That is why the crew is so thoroughly screened both before and during their employment." *Id.* at 31.

applied in the process of a security clearance. See *Department of the Navy* v. *Egan*, 484 U.S. 518, 528-529 (1988). Criteria such as emotional stability, sound judgment in meeting emergency situations, and freedom from drug and alcohol abuse are considered in evaluating an individual's reliability. See MCCPAC Nuclear Weapons Management Manual §§ 4-100 to 4-102 (C.A. E.R. 23-26). The factors in each employee's case must be evaluated to determine whether a PRP certification would be "clearly consistent with the interest of national security," and because of the factors necessary for that certification, "[m]any individuals, though not disqualified for service generally, nevertheless may be considered unsuitable to hold a 'high risk' position." *Ibid.*

2. Petitioner had been PRP certified and aboard Kilauea for just over two months when the first in a series of disciplinary and legal problems occurred. On February 12, 1989, he was apprehended at the main gate of the Subic Bay, Philippines, base for attempting to exit with excessive tax-free items, in violation of merchandise control regulations. Petitioner was reprimanded and his tax-free privileges were suspended for six months. Pet. App. 42a-43a; C.A. E.R. 65.

A few weeks thereafter, local authorities in the Philippines brought charges against petitioner, alleging sexual misconduct with a Filipino minor. The charges were subsequently dismissed, with a finding that petitioner had not deceived the minor by promising marriage, Pet. App. 43a, "after an unconfirmed cash payoff," *id.* at 40a.

On May 9, 1989, petitioner and another Kilauea crew member, Roger Olaes (an Asian/Pacific Islander male), became involved in a physical altercation off

the ship in the city of Olongapo, in the Philippines. The disturbance required the intervention of the Olongapo City authorities and United States military police. Pet App. 39a. The Master of the Kilauea, Captain Bruce Butterfield, reprimanded both petitioner and Olaes. *Id.* at 28a, 43a.

Petitioner then attempted to "press[] charges" with Captain Butterfield against other crew members. C.A. E.R. 30; Pet. App. 44a. Captain Butterfield explained to petitioner that, on board ship, only the Master could file "charges," but he informed petitioner of his right to file a grievance, and he attempted to explain how to do so. C.A. E.R. 38-39. Petitioner then became confrontational and accused Captain Butterfield of engaging in a "cover up." *Id.* at 40.

On May 18, 1989, Captain Butterfield concluded, in light of petitioner's serious problems during his short time aboard the Kilauea, that petitioner did not meet the PRP reliability standards. "The crux of the matter," according to Captain Butterfield, was that petitioner was "potentially dangerous in dealing with arms [and] explosives," as he had been involved in "several questionable incidents where his behavior was gener-ally hostile, erratic and sometimes abusive." C.A. E.R. 28.[2] Accordingly, Captain Butterfield paid peti-tioner off the ship, repatriated him to the United States, and recommended his decertification from the PRP. Petitioner was

[2] Captain Butterfield also noted, in addition to the problems mentioned in the text, that petitioner was given "to wild ramblings and verbally abusing other [crew members]," and he was concerned that if crew members "had to watch out all the time for [petitioner], they would be less able to pay attention to what they were doing on the job." C.A. E.R. 31.

decertified from the PRP on October 3, 1989. *Id.* at 31, 65.

3. Petitioner filed a discrimination complaint with the Navy's equal employment opportunity officials, alleging that his repatriation from the Kilauea was the result of discrimination on the basis of his race (African-American) and color (black). The initial examiner recommended a finding of racial discrimination. Pet. App. 56a-68a. The Navy, however, rejected that recommendation and issued a disposition finding Captain Butterfield's articulated reasons for repatriation to be legitimate and non-discriminatory; the Equal Employment Opportunity Commission (EEOC) affirmed the Navy's conclusion that the repatriation was not discriminatory. *Id.* at 37a-55a.

4. Petitioner then brought this Title VII action against the Secretary of the Navy and the Department of the Navy in district court, alleging that the Navy discriminated against him on the basis of race when it repatriated him from the Kilauea. See C.A. E.R. 1-3. Petitioner did not name Captain Butterfield as a defendant, nor did he plead a cause of action arising under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

On the Navy's motion for summary judgment, the district court concluded that it did not have "the power under Title VII to review the merits of the [Navy's] decision" to revoke petitioner's PRP certification. Pet. App. 31a. Although petitioner had filed only an employment discrimination complaint under Title VII, the court also concluded (*id.* at 32a-33a) that petitioner could not challenge the merits of his decertification by bringing "a constitutional claim against a superior officer or against the Department of the Navy."

5. The court of appeals affirmed.[3] Pet. App. 1a-14a. It concluded that this Court's decision in *Egan*, *supra*, and its own subsequent decision in *Dorfmont* v. *Brown*, 913 F.2d 1399 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991), "preclude judicial review of security clearance decisions made by the Executive or his delegee." Pet. App. 6a. The court read *Egan* and *Dorfmont* as indicating that the usual presumption of judicial review of agency action "is negated when it conflicts with national security concerns." *Id.* at 7a. It also stressed that security clearance decisions, which are "heavily dependent on the ability of the decision-maker to predict the future behavior of the applicant," involve " 'sensitive and inherently discretionary' exercises" in predictive judgment that must be made by experts in the Executive Branch, rather than an "outside nonexpert body" (*ibid.*).

The court's analysis of the process for adjudication of Title VII claims under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), convinced it that it could not review petitioner's discrimination claim without also engaging in a review of the merits of the decertification itself. Pet. App. 8a-9a. The court noted that, under *McDonnell Douglas*, once petitioner made out a prima facie case of discrimination, the burden would shift to the Navy to provide legitimate, nondiscriminatory reasons for its actions, and that, after those reasons were provided, the burden would shift back to petitioner to establish that those supposedly legitimate reasons were, in fact,

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[3] Petitioner appealed *pro se*, but after initial briefing, the court of appeals appointed counsel for him and received supplemental briefing from all parties. C.A. E.R. 154.

pretexts for unlawful discrimination. *Id.* at 8a. The court then stated:

> The second and third steps of the Title VII analysis present an insurmountable hurdle for [petitioner]. It is impossible for the court to establish in the first place whether the Navy's proffered reasons were legitimate without evaluating their merits. Even if the court were able to get by step two, it is very likely to be impossible for it to proceed to step three and determine whether the given reasons were mere pretext without considering their merits.

Pet. App. 9a. Accordingly, the court held that it could not review petitioner's decertification from the PRP program under Title VII. *Ibid.*

Despite petitioner's failure to plead a *Bivens* claim, the court ruled that *Bivens* actions are not available "where the claim involves employment discrimination and the plaintiff is a civilian employee of the military." Pet. App. 10a-11a. The court noted that, in *Brown* v. *General Services Administration*, 425 U.S. 820, 835 (1976), this Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." The court acknowledged that, under *Davis* v. *Passman*, 442 U.S. 228 (1979), congressional employees, who at that time were not covered by Title VII, could bring *Bivens* actions based on the equal protection component of the Fifth Amendment. It found *Davis* inapposite, however, because, unlike the congressional employees in *Davis*, civilian employees of the military are "covered by the 'massive and complex program' of Title VII in all areas of discrimination *except* for

that relatively narrow area dealing with security clearance decisions." Pet. App. 11a.

ARGUMENT

1. Petitioner contends that, under Title VII of the Civil Rights Act of 1964, the courts may review the Navy's revocation of his PRP certification—an action akin to the revocation of a security clearance—to decide whether the Navy engaged in unlawful discrimination in doing so.[4] The court of appeals' decision to the contrary is consistent with the decisions of the other two courts of appeals that have considered that issue, and it does not conflict with any decision of this Court. Further review is therefore not warranted.

a. Both lower courts in this case, and the other courts of appeals that have considered the Title VII issue presented, found guidance in this Court's decision in *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988). In *Egan*, the Court held that Congress had not authorized the Merit Systems Protection Board (MSPB) to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse federal personnel action. The text of the statute at issue in that case, 5 U.S.C. 7512, neither expressly authorized nor expressly precluded appellate administrative review of

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[4] As noted above, a PRP certification is like a security clearance determination in that both determinations (i) directly implicate national security concerns, and (ii) apply the "clearly consistent with the interest of the national security" standard. See *Egan*, 484 U.S. at 528-529; C.A. E.R. 26. In the courts below, the parties agreed that the decertification should be treated as the equivalent of a revocation of a security clearance. Pet. App. 4a n.1.

an agency's denial of a security clearance, and the respondent contended that the absence of express preclusion "create[d] a strong presumption in favor of appellate review." 484 U.S. at 526. The Court rejected that argument; it stated that while, as a general matter of administrative law, there may indeed be a presumption of appellate review of agency action, that proposition "runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* at 526-527.

The Court also observed that "[t]he grant of a clearance requires an affirmative act of discretion on the part of the granting official" (484 U.S. at 528), and that the decisionmaking involved is "an inexact science at best" (*id.* at 529). Because "[p]redictive judgment[s] of this kind must be made by those with the necessary expertise, * * * it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk." *Ibid.* Accordingly, "unless Congress has specifically provided otherwise," courts should be reluctant to intrude on the authority of the Executive Branch to grant or deny security clearances. *Id.* at 530.

b. Relying on *Egan*, the courts of appeals have, thus far, unanimously concluded that Congress did not intend courts to review revocations of individual security clearances in the context of Title VII liti-

gation. As did the courts below, the Fifth Circuit recently concluded that Title VII does not authorize judicial review of security clearance determinations. *Perez* v. *FBI*, 71 F.3d 513 (1995). In that case, which involved an allegation of a retaliatory revocation of a security clearance, the FBI proffered evidence, at the second stage of the *McDonnell Douglas* scheme, that the plaintiff's clearance was terminated for legitimate, non-discriminatory reasons. The Fifth Circuit noted that, "[i]n the ordinary Title VII situation, that would put the ball in [the plaintiff's] court to show pretext," but that, "[b]ecause the court would have to examine the legitimacy and the possibly pretextual nature of the FBI's proffered reasons for revoking the employee's security clearance, any Title VII challenge to the revocation would of necessity require some judicial scrutiny of the merits of the revocation decision." *Id.* at 514 (footnotes omitted). The court quoted *Egan* for the proposition that " '[p]redictive judgments of this kind' properly are left to 'those with the necessary expertise in protecting [the sensitive material,]' rather than in the hands of 'an outside nonexpert body' or the equally nonexpert federal courts." *Id.* at 514 n.6.

In considering a claim of discrimination based on disability under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, which parallels much of Title VII, the Fourth Circuit also relied on *Egan* to conclude that it could not review the Navy's revocation of the plaintiff's security clearance. *Guillot* v. *Garrett*, 970 F.2d 1320 (4th Cir. 1992). After considering at length the statements in *Egan* that appellate bodies do not have authority to review security clearance decisions unless "Congress *specifically* has provided otherwise," *id.* at 1324, the court stated,

"[w]e can discern * * * no more an expression of congressional intent in the provisions of the Rehabilitation Act or the Civil Rights Act of 1964 than in section 7513 of title 5 that the Executive's security clearance decisions be reviewable by the MSPB or by federal courts on appeal." 970 F.2d at 1325.

The courts of appeals that have considered the question have thus been unanimous in concluding that the merits of individual security clearance decisions are not reviewable by courts under Title VII.[5] They have reached similar conclusions about judicial review of security clearance denials under other statutes and in other contexts.[6]

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[5] Petitioner's contention (Pet. 9-11) that the decision below conflicts with *South Dakota* v. *Bourland*, 508 U.S. 679 (1993), *McKennon* v. *Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995), and *Davis* v. *Passman*, 442 U.S. 228 (1979), is incorrect. None of those cases arose in the national security context, and therefore none involved the concern about "outside nonexpert" review of security clearance decisions.

[6] In *Dorfmont* v. *Brown*, 913 F.2d 1399 (1990), cert. denied, 499 U.S. 905 (1991), the Ninth Circuit affirmed the dismissal of a suit by an employee of a defense contractor, who challenged the revocation of her security clearance on due process grounds. Accord *Hill* v. *Department of Air Force*, 844 F.2d 1407, 1409 (10th Cir.), cert. denied, 488 U.S. 825 (1988).

In *Dubbs* v. *CIA*, 866 F.2d 1114 (1989), the Ninth Circuit held that the plaintiff could not challenge the denial of her security clearance under the Administrative Procedure Act, although she could pursue a colorable constitutional challenge to that denial, which was alleged to be based on her sexual orientation, under equal protection principles.

The D.C. Circuit held in *United States Information Agency* v. *Krc*, 905 F.2d 389 (1990), that the Foreign Service Act does not give the Foreign Service Grievance Board jurisdiction to review the decision of a security program manager to withdraw a foreign service officer plaintiff from overseas

2. Petitioner also urges (Pet. 20-24) this Court to decide whether courts may entertain a challenge under *Bivens*, based directly on the equal protection component of the Fifth Amendment, to the revocation of a security clearance. Petitioner did not plead a *Bivens* claim in his complaint, which was a form complaint for Title VII cases. See C.A. E.R. 1-3. Moreover, he named, as defendants, only the Department of the Navy and the Secretary of the Navy—the latter in his official capacity as the agency head required to be named as the party defendant in Title VII litigation against a federal agency. See 42 U.S.C. 2000e-16(c); Pet. App. 55a (EEOC right to sue notice). A *Bivens* action may not be brought against a federal agency, see *FDIC* v. *Meyer*, 114 S. Ct. 996, 1004-1006 (1994), and the same rule logically applies to actions brought against federal officials in their official capacities, see *Brandon* v. *Holt*, 469 U.S. 464, 471 (1985).[7]

In all events, the court of appeals' decision (Pet. App. 10a-12a) that a *Bivens* action is not available to challenge the revocation of a security clearance of a civilian employee of the military is consistent with the decision of the Fifth Circuit in *Perez* v. *FBI*, *supra*, the only other appellate decision that has addressed the matter. In the decision below, the court of appeals concluded (Pet. App. 11a) that petitioner's *Bivens* action was precluded by *Brown* v. *General Services Administration*, 425 U.S. 820, 835 (1976),

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postings, and that the court also did not have authority under the Administrative Procedure Act to review the decision.

[7] There is no suggestion in the petition, or in any of the papers presented to the lower courts, that the Secretary of the Navy was personally involved in petitioner's case.

which held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." In *Perez*, the Fifth Circuit held, for the same reason, that a *Bivens* action is not available for discrimination claims. The Fifth Circuit concluded that the district court had "correctly relied on Supreme Court and Fifth Circuit precedent to the effect that Title VII provides the exclusive cause of action and the exclusive remedy for federal employees who wish to assert claims of employment discrimination," 71 F.3d at 515, and it cited *Brown* for that proposition, *id.* at 515 n.8.

Contrary to petitioner's contention (Pet. 21-22), the decision below does not conflict with *Davis* v. *Passman*, 442 U.S. 228 (1979). *Davis* involved a congressional employee who (unlike petitioner) was at the time excluded entirely from the protection of Title VII and had no statutory remedy at all (in damages or otherwise) for employment discrimination. The court of appeals concluded that, in the present situation, unlike that in *Davis*, "Congress has designed a program that provides what it considers adequate remedial mechanisms for constitutional violations, [and] *Bivens* action[s] should not be implied." Pet. App. 11a.

Petitioner also seeks support from *Webster* v. *Doe*, 486 U.S. 592, 603-604 (1988), in which the Court held that Congress had not foreclosed the courts from reviewing a "colorable constitutional claim[]" that the respondent in that case was discharged from the Central Intelligence Agency on the basis of sexual orientation. *Webster*, however, was a suit for reinstatement, not a *Bivens* action for damages; the complaint in that case did not request damages from

any individual federal official. *Id.* at 596-597.[8] Although (as petitioner notes, Pet. 19) the Court stated in *Webster* that claims "attacking the hiring and promotion policies of the [CIA]" were already being heard by the federal courts, those claims do not necessarily involve the revocation or denial of a security clearance.

3. We also note that the President has recently established an administrative remedy for claims of discrimination in security clearance decisions. On August 2, 1995, the President issued Executive Order 12,968, which states that "[t]he United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information." Exec. Order No. 12,968, § 3.1(c), 60 Fed. Reg. 40,250 (1995). The Order provides for administrative review of revocations and denials of security clearances; it also provides that an employee who has received an adverse security clearance decision must be given a statement of reasons for the decision, and has the right to respond, the right to representation by counsel, and the right to appeal to a high-level panel within the agency. § 5.2, 60 Fed. Reg. 40,252 (1995).

Although the actions here preceded the issuance of Executive Order 12,968, petitioner had the benefit of similar administrative safeguards. He was provided with a statement of reasons for Captain Butterfield's

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[8] The courts below addressed only whether petitioner could bring an action for damages against his superiors. The case does not raise, and we do not address, the question whether any equitable cause of action under the Constitution might be available.

recommendation that he be decertified. He availed himself of the opportunity to respond to those reasons, and a final decision regarding decertification was made by officials other than Captain Butterfield. Although the EEOC did not directly review the decertification decision, it concluded that Captain Butterfield's decision to repatriate petitioner from the ship was not tainted by discrimination. Pet. App. 37a-55a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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